DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-52
Title: Dan's City Used Cars, Inc., dba Dan's City Auto Body, Petitioner
v.
Robert Pelkey
Docketed: July 13, 2012
Lower Ct: Supreme Court of New Hampshire
Case Nos.: (2011-144)
Decision Date: April 10, 2012

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Mar 13 2011	Reply of petitioner Dan's City Used Cars, Inc., dba Dan^s City Auto Body filed. (Distributed)
Jul 9 2012	Petition for a writ of certiorari filed. (Response due August 13, 2012)
Aug 29 2012	DISTRIBUTED for Conference of September 24, 2012.
Sep 6 2012	Response Requested . (Due October 9, 2012)
Oct 4 2012	Order extending time to file response to petition to and including November 8, 2012.
Nov 8 2012	Brief of respondent Robert Pelkey in opposition filed.
Nov 16 2012	Reply of petitioner Dan's City Used Cars, Inc., dba Dan^s City Auto Body filed.
Nov 20 2012	DISTRIBUTED for Conference of December 7, 2012.
Dec 7 2012	Petition GRANTED.
Jan 7 2013	SET FOR ARGUMENT ON Wednesday, March 20, 2013
Jan 22 2013	Joint appendix filed. (Statement of costs filed)
Jan 22 2013	Brief of petitioner Dan's City Used Cars, Inc., dba Dan^s City Auto Body filed.
Jan 28 2013	CIRCULATED
Jan 28 2013	Brief amicus curiae of California Tow Truck Association filed. (Distributed)
Jan 30 2013	Record received from Supreme Court of New Hampshire. (1 box)
Feb 7 2013	Record received from Superior Court Northern District of Hillsborough County. (1 box).
Feb 21 2013	Brief of respondent Robert Pelkey filed. (Distributed)
Feb 27 2013	Motion for leave to file amici brief filed by International Municipal Lawyers Association, et al.
Feb 27 2013	Motion for leave to file amicus brief filed by Massachusetts Jobs With Justice.
Feb 28 2013	Brief amicus curiae of the United States filed. (Distributed)
Feb 28 2013	Motion of the Solicitor General for leave to participate in oral argument as

	amicus curiae and for divided argument filed.
Feb 28 2013	Brief amici curiae of Louisiana, New Hampshire, et al. filed. (Distributed)
Feb 28 2013	Brief amicus curiae of Towing and Recovery Association of America filed. (Distributed)
Feb 28 2013	Brief amicus curiae of Property Casualty Insurers Association of America filed. (Distributed)
Mar 13 2013	Reply of petitioner Dan's City Used Cars, Inc., dba Dan^s City Auto Body filed. (Distributed)
Mar 15 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Mar 15 2013	Motion for leave to file amici brief filed by International Municipal Lawyers Association, et al. GRANTED.
Mar 15 2013	Motion for leave to file amicus brief filed by Massachusetts Jobs With Justice GRANTED.
Mar 20 2013	Argued. For petitioner: Andre D. Bouffard, Burlington, Vt. For respondent: Brian C. Shaughnessy, Manchester, N. H.; and Lewis S. Yelin, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)
May 13 2013	Adjudged to be AFFIRMED. Ginsburg, J., delivered the opinion for a unanimous Court.

PETITION FOR WRIT OF CERTIORARI

RECORD
AND
BRIEFS

No. 12-52

Supreme Court, U.S.
FILED
JUL - 9 2012
OFFICE OF THE CLERK

In The

Supreme Court of the United States

DAN'S CITY USED CARS, INC. D/B/A DAN'S CITY AUTO BODY

Petitioner,

v.

ROBERT PELKEY,

Respondent.

On Petition For A Writ of Certiorari To The Supreme Court of New Hampshire

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether state statutory, common law negligence, and consumer protection act enforcement actions against a tow-motor carrier based on state law regulating the sale and disposal of a towed vehicle are related to a transportation service provided by the carrier and are thus preempted by 49 U.S.C. §14501(c)(1).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Dan's City Used Cars, Inc. d/b/a Dan's City Auto Body states no parent or publicly held company owns any of its stock.

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OPINION BELOW

The Supreme Court of New Hampshire has not yet published its Opinion in the New Hampshire Reports. The Slip Opinion is reprinted in the Appendix at 1-22.

♦

JURISDICTION

The Supreme Court of New Hampshire issued its decision on April 10, 2012. This Court has jurisdiction under 28 U.S.C.A. § 1254(1) to review The Supreme Court of New Hampshire's decision on a writ of certiorari.

♦

STATUTORY PROVISIONS INVOLVED

49 U.S.C. §14501(c)(1)

General Rule - Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

49 U.S.C. §13102 (23)

Transportation The term transportation includes

(A) a motor vehicle, vessel, warehouse, wharf, pier,dock, yard, property, facility, instrumentality,

or equipment of any kind related to the movement of passengers or property, or both, regardless of ownership or agreement concerning use; and

(B) services related to that movement, including arranging for, receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, packing, unpacking, and interchange of passengers and property.

New Hampshire Revised Statutes (RSA)

Chapter 262 Antitheft Laws, Offenses, Penalties, Habitual Offenders, Arrest of Non-Residents and Abandoned Vehicle

RSA 262:36-a Disposal by Storage Company.. App. 34

RSA 262-37 Sale Authorized..... App. 34

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Chapter 358-A Regulation of Business Practices for Consumer Protection

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STATEMENT OF THE CASE

On February 3, 2007, Petitioner Dan's City Used Cars, Inc. d/b/a Dan's City Auto Body (Dan's City) towed a 2004 Honda from the Colonial Village parking lot because its owner had not moved the vehicle to allow for snow removal. Appendix (hereinafter App.) 24. When the Honda was not claimed within thirty days, Dan's City filed a Notice to the Director of Removal with the New Hampshire Department of Safety requesting permission to sell the Honda at auction without notice. App. 24. The March 12, 2007 Notice stated that the market value of the vehicle was under $500 and the vehicle was not in condition for legal public way use. App. 24. On March 29, 2007, the New Hampshire Division of Motor Vehicles (DMV) notified Dan's City of the name and address of the last registered owner of the Honda, and further advised Dan's City that notice of the auction was to be sent to the last known address of the vehicle's owner fourteen days before the auction was scheduled to occur. App. 24. Respondent Robert Pelkey was identified as the last owner of record of the Honda. App. 24.

Dan's City proceeded to advertise the auction of the Honda as required under RSA 262:38. Dan's City also sent Pelkey a certified letter notifying him that Dan's City had towed his vehicle and Dan's City was storing it. App. 24. The letter was returned by the Post Office, and the box moved, left no address was checked. App. 24. Prior to the auction, Pelkey's legal counsel learned that Pelkey's vehicle had been

towed by Dan's City and was scheduled to be sold at public auction on April 19, 2007. App. 24-25. Pelkey's legal counsel contacted Dan's City and advised that Pelkey had not abandoned his vehicle, and wanted to pay any charges owed and reclaim his vehicle. App. 25. Pelkey did not pay the towing and storage charges before or after the auction, at which no third-party bid on the Honda. Ultimately, Dan's City disposed of the car through trade. App. 25.

On March 27, 2009, Pelkey filed suit against Dan's City alleging, in part, that Dan's City's actions violated RSA 262,[1] which regulates the towing, sale and disposal of a vehicle from private property without the owner's consent ("non-consensual tow"). Pelkey also claimed Dan's City breached the common law duty of a bailee to use reasonable care to ascertain the identity of a vehicle's owner, to return it to him, and to use reasonable care in disposing of the vehicle. Pelkey additionally asserted that Dan's City violated New Hampshire's Consumer Protection Act, RSA 358:A-2, by making false statements about the vehicle on the Notice of Removal sent to the DMV, by failing to follow the procedures set forth in RSA 262, and by failing to cancel the auction.

On May 22, 2010, Dan's City moved for summary judgment on all counts, asserting that it was a motor carrier of property for purposes of this case, that Pelkey's claims arose out of the non-

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1 *See* 262:36-a, 262:37, 262:38, 262:39, and 262:40-a. App. 34-36.

consensual towing services provided by Dan's City, and that all of Pelkey's claims were preempted by 49 U.S.C. §14501(c)(1). On December 17, 2010, the Hillsborough County Superior Court granted Dan's City's motion for summary judgment, (Opinion, App. 33) finding that the plaintiff's claims "relate to Dan City's retention of a towed vehicle without notifying him; Dan's City's alleged sale of the towed vehicle as an abandoned vehicle under New Hampshire law; and Dan's City's alleged failure to comply with state requirements regarding Dan's City's towing and handling of abandoned vehicles. (cite omitted). These claims relate specifically to Dan's City's handling of the vehicle it tows, i.e., its service regarding the property it transports,' and expressly seek the enforcement of state laws related to duties owed stemming from the transportation of property." Opinion, App. 31-32. "The Court finds that the plaintiff's claims against Dan's City relate to Dan's City's service and therefore fall within the scope of claims preempted by 49 U.S.C. §14501(c)(1)." Opinion, App. 32.

On April 10, 2012, the Supreme Court of New Hampshire (hereinafter the "New Hampshire Supreme Court") reversed the trial court's decision, concluding that "plaintiff's action for wrongful disposition of his vehicle under state law is not preempted under 49 U.S.C. §14501(c)(1)." Slip Opinion, App. 22. In reaching this decision, the New Hampshire Supreme Court stated that "[w]e are convinced that §14501(c)(1) does not preempt state laws pertaining to the manner in which a towing company disposes of vehicles in its custody to collect towing and storing charges secured by a lien." Slip

Opinion, App. 10. The New Hampshire Supreme Court reasoned that Congress did not intend to displace state law causes of action against custodians of towed vehicles (Slip Opinion, App. 10) in part because such claims are not related to the "transportation of property." Slip Opinion, App. 13. But, even if these claims could be considered related to the "transportation of property," the New Hampshire Supreme Court concluded that these claims are not sufficiently related to the towing company's "service" to be preempted because the claims arise out of the custodian's act of disposing of the vehicle – not towing it. Slip Opinion, App. 19. The New Hampshire Supreme Court also opined "that the absence of any federal remedy for private injuries of the kind allegedly suffered by the plaintiff also supports the inference that Congress did not intend to displace the operation of state laws in this context." Slip Opinion, App. 20.

REASON FOR GRANTING THE PETITION

THIS COURT SHOULD RESOLVE THE SPLIT AMONG STATE SUPREME COURTS - AND BETWEEN A STATE SUPREME COURT AND A CIRCUIT COURT - AS TO WHETHER 49 U.S.C. §14501(c)(1) PREEMPTS STATE LAWS REGULATING THE SALE AND DISPOSAL OF A TOWED VEHICLE, AND THE ENFORCEMENT OF THOSE LAWS AGAINST A TOW-MOTOR CARRIER THROUGH A STATE S CONSUMER PROTECTION ACT.

I. This Case Squarely Presents A Conflict.

In *Rowe v. New Hampshire Motor Transport Ass'n.*, this Court was asked to determine, in part, if 49 U.S.C. §14501(c)(1) preempted Maine law requiring motor carriers to provide a special delivery service designed to ensure that cigarettes were not being sold to minors. *Rowe v. New Hampshire Motor Transport Ass'n.*, 552 U.S. 364, 371 (2008). §14501(c)(1) provides, in pertinent part, that:

> "a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier....with respect to the transportation of property."

49 U.S.C. §14501(c)(1). Tow trucks are motor carriers of property within the meaning of 49 U.S.C. §14501(c)(1). *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 430 (2002).

In analyzing whether this Maine law was "related to" the price, route, or service of a motor carrier, this Court construed "related to" as it had in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992) (holding that a state enforcement action is "related to" the price, route or service of an airline carrier, and therefore preempted, if the state enforcement action has "a connection with, or reference to" carrier rates, routes, or services). Applying the *Morales* principle to the facts in *Rowe*, this Court held that in regulating delivery service

procedures, Maine state law focused on trucking and similar services, thereby creating a direct "connection with motor carrier services," thus preempting same. *Rowe*, 552 U.S. at 369.

Since *Rowe* was decided, the 6th Circuit, the Supreme Court of Alabama (hereinafter the "Alabama Supreme Court"), and the New Hampshire Supreme Court have all relied upon *Rowe* in determining if Congress intended 49 U.S.C. §14501(c)(1) to preempt state enforcement actions against a tow-motor carrier arising out of its sale of a towed vehicle for unpaid towing and storage fees. *See Ware v. Tow Pro Custom Towing and Hauling, Inc.*, 289 Fed. Appx. 852 (6th Cir. 2008) (not published in F. Supp.); *Weatherspoon v. Tillery Body Shop, Inc.*, 44 So.3d. 447 (Ala. 2010); *Robert Pelkey v. Dan's City Used Cars, Inc. d/b/a Dan's City Auto Body*, Slip Opinion (4-10-2012) at App. 5. In doing so, the 6th Circuit and the Alabama Supreme Court held that state law regulating the sale and disposal of a towed vehicle is preempted by §14501(c)(1). *Ware*, 289 Fed. Appx. at 856; *Tillery*, 44 So. 3d at 448. On a fact pattern almost identical to those in the *Ware* and *Tillery* cases, the New Hampshire Supreme Court reached the opposite conclusion. *Pelkey*, *supra*, at App. 22.

Thus in *Ware*, plaintiffs' truck was towed from a truck stop by Tow Pro Custom Hauling, Inc. ("Tow Pro") without the Wares' knowledge or consent. *Ware*, 289 Fed. Appx. at 853. When Danny Ware found out where their truck was being stored, he contacted Tow Pro and was told he would need to pay outstanding towing and storage fees before Tow Pro

would release the truck. *Id.* Tow Pro also informed the Wares' legal counsel, and subsequently the Wares, that the truck was subject to sale at auction if the outstanding fees were not paid in ten days. *Id.* at 853-854. When no payment was forthcoming, Tow Pro published notices of the sale in a local newspaper, and ultimately sold the vehicle to Tow Pro's owner. *Id.* at 854.

The Wares brought suit against Tow Pro based, in part, on Tow Pro's alleged failure to comply with a Tennessee law which sets out the circumstances under which a garage keeper in possession of a towed vehicle obtains a lien on it for towing and storage charges. *Id.* at 856. The Wares also claimed, in part, that Tow Pro converted their truck by failing to provide the Wares sufficient notice of the sale of their vehicle, as required under Tennessee law. The Sixth Circuit, however, held that the Wares' claims relate on their face to the transportation of property, which as defined by §131020 (23) includes storage, and thus the Wares' claims fall within §14501(c)'s preemptive reach. *Id.* (citing in part to *Ace Auto Body & Towing v. City of New York*, 171 F.2d 765 (2nd. Cir. 1999) (rejecting the argument that "transportation" as it is used in §14501(c)(1) does not include "storage," and criticizing *Rhode Island Pub. Towing Ass'n v. Rhode Island*, Civ. No. 96-454ML, 1997 WL 135571 (D.R.I. Feb. 28, 1997) (not published in F. Supp.) for ignoring the broader statutory definition of the term transportation that Congress gave it). The 6th Circuit therefore affirmed the district court's ruling preempting the Wares' claims, concluding the lower court was "clearly correct in light of the plain

language of the statute and the Supreme Court's ruling in *Rowe v. New Hampshire Motor Transport. Ass'n.*, absent a statutory exemption from preemption.[2] *Id.* at 856 (citing to *Rowe v. New Hampshire Motor Transport Ass'n.*, 552 U.S. at 371).

Similarly, in *Weatherspoon v. Tillery Body Shop, Inc.*, plaintiff Debra Weatherspoon's Chevrolet Blazer was towed by Tillery Body Shop, Inc. ("Tillery") without her knowledge after police determined it was abandoned. *Weatherspoon*, 44 So. 3d at 448. Four months later, Tillery published a notice in the local paper for three consecutive weeks stating that the Blazer would be sold at public auction. *Id.* The auction was held, and a third-party purchased the Blazer from Tillery, who reported that the Blazer had been sold in compliance with the Alabama law which governs the sale of abandoned vehicles. *Id.* at 449.

Weatherspoon subsequently sued Tillery, alleging a violation of state statutes regulating towing services, including the sale and disposal of a vehicle for unpaid towing and storage fees, as well as numerous other claims, including fraudulent suppression of Tillery's duty to disclose to

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[2] The 6th Circuit did not reach the issue of whether an exemption to preemption applied in this case because plaintiffs failed to raise the issue in the lower court. *Ware*, 289 Fed. Appx. at 858 (noting that the California Court of Appeals in *CPF Agency Corp. v. Sevel's 24 Hour Towing Serv.*, 34 Cal.Rptr.3d 120 (Cal.Ct.App.2005) held that plaintiff's claim that a towing service had overcharged it for storage fees was expressly excepted from preemption.

Weatherspoon that it had her vehicle. *Weatherspoon*, 44 So.3d. at 448. In considering Tillery's claims, the Alabama Supreme Court reasoned that her claims related specifically to the towing company's handling of the vehicles it towed, and expressly sought the enforcement of state laws related to duties owed stemming from the transportation of the truck. *Id.* The Alabama Supreme Court therefore held that Tillery's state law claims against the towing company were preempted by 49 U.S.C. §14501(c)(1). *Id.*

In doing so, the Alabama Supreme Court rejected several arguments made by the *Weatherspoon* dissent, (Murdock, J. dissenting), and arguments made in the 6th Circuit dissenting opinion in *Ware* (Griffin, J., concurring in part and dissenting in part). *See Weatherspoon*, 44 So. 2d at 459; *Ware*, 289 Fed. Appx. at 858. Focusing on the definition of storage, the *Ware* dissent construed storage to apply to the freight and cargo being transported by a motor carrier, not to the storage by the motor vehicle carrier of a vehicle it had towed. Similarly, the dissent in *Weatherspoon* argued that storage is not sufficiently related to a price, route or service of a tow truck for preemption to apply. *Id.* (citing to *Rhode Island Public Towing Ass'n, Inc. v. State,* (No. CV-96-154 ML, Feb. 28, 1997 D.K.I. 1997) (not published in F. Supp.). The dissent in *Weatherspoon* also argued that the States' historic powers are not to be superseded by a Federal Act unless that is the clear and manifest purpose of Congress, which it did not find to be true in this case. *Weatherspoon*, 44 So. 2d at 463. It viewed Congress's failure to include a lack of remedy where

a tow truck operator wrongfully disposes of a vehicle as a strong indicator that Congress simply did not intend for federal law to preempt state law in this specific regard. *Id.*

II. The Issue Presented By The Conflict Is Of Great Practical And Recurring Importance, And Only This Court Can Resolve It.

The New Hampshire Supreme Court, and the 6th Circuit and the Alabama Supreme Court, reached opposite conclusions as to whether §14501(c)(1) preempts state law related to the sale and disposal of towed vehicles for unpaid towing and storage charges. This split occurred despite the fact that all three courts were faced with a nearly identical fact pattern where a vehicle was towed without the knowledge or consent of the owner; the owner failed to pay the towing and storage charges due; the tow-motor carrier sold the vehicle to obtain payment for its services; and the owner sued the tow-motor carrier alleging violation of state laws governing the sale of a towed vehicle for unpaid towing and storage charges, various common law claims alleging a duty on the part of the tow-motor carrier to return the towed vehicle to its owner, and consumer protection act or fraud claims. In addition, all three courts relied upon *Rowe* in assessing whether Congress intended to preempt the state law in question, and whether the plaintiff's claims were "related to" the "service" of a tow-motor carrier. All three courts likewise construed the same definition of "transportation," again reaching differing results. The split among these courts therefore could not be

clearer, and this Court is the only Court that can resolve this issue.

This Court should grant this Petition for a writ of certiorari because the situation presented – i.e. the towing of a vehicle without the knowledge or consent of the owner – is a routine service provided by tow-motor carriers in every city and town in this country. Tow-motor carriers need to know whether with every non-consensual tow they face a potential lawsuit brought by an unhappy vehicle owner who fails to timely claim his vehicle, fails to pay for the towing and storage charges, and then loses that vehicle at auction. A definitive ruling on the scope of preemption under §14501(c)(1) with respect to the sale and disposal of a towed vehicle will also provide state and local governments with guidance as to the general types of laws and ordinances related to tow truck operations which are preempted under §14501(c)(1). This would, in turn, avoid needless litigation in the lower courts over a very real situation which tow-motor carriers, and owners of vehicles towed without the owner's knowledge and consent, will continue to face on a daily basis.

III. The Decision Below Is Incorrect.

In rejecting the well-reasoned opinions of the Alabama Supreme Court and the 6th Circuit on the scope of §14501(c)(1) preemption with respect to tow-motor carriers, the New Hampshire Supreme Court created an artificial distinction between the act of towing, and the necessary storage and possible disposal of the towed vehicle. This artificial distinction is at odds with the plain meaning of §14501(c)(1). The New Hampshire Supreme Court's

decision that the storing of vehicles is not sufficiently related to a towing service is similarly at odds with the plain meaning of transportation as defined in §13102(23), which includes storage. Moreover, the New Hampshire Supreme Court has totally ignored the obvious economic impact which making tow-motor carriers subject to multiple state and local laws and ordinances will have on tow-motor carriers. *See generally R. Mayer of Atlanta, Inc.*, 158 F.3d 538, 546 (11th Cir. Ga. 1998), at fn6. In addition, the New Hampshire Supreme Court's focus on the lack of a federal remedy is misplaced. Congress undoubtedly recognized that there are other precautionary measures which a state or municipality can take to limit, if not totally prevent, situations where a vehicle owner who truly has not abandoned it fails to claim the vehicle in a timely manner.

CONCLUSION

The Court should grant the Petition for a writ of certiorari and reverse the decision of the Supreme Court of New Hampshire.

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NOTICE: This opinion is subject to motions for rehearing under Rule 22 as well as formal revision before publication in the New Hampshire Reports. Readers are requested to notify the Reporter, Supreme Court of New Hampshire, One Charles Doe Drive, Concord, New Hampshire 03301, of any editorial errors in order that corrections may be made before the opinion goes to press. Errors may be reported by E-mail at the following address: reporter@courts.state.nh.us. Opinions are available on the Internet by 9:00 a.m. on the morning of their release. The direct address of the court's home page is: http://www.courts.state.nh.us/supreme.

THE SUPREME COURT OF NEW HAMPSHIRE

Hillsborough-northern judicial district
No. 2011-144

ROBERT PELKEY

v.

DAN'S CITY USED CARS, INC. D/B/A DAN'S CITY AUTO BODY

Argued: February 9, 2012
Opinion Issued: April 10, 2012

Kazan, Shaughnessy, Kasten & McDonald, PLLC, of Manchester (Brian C. Shaughnessy on the brief and orally), for the plaintiff.

Downs Rachlin Martin PLLC, of Lebanon (Kate Strickland on the brief and orally), for the defendant.

LYNN, J. The plaintiff, Robert Pelkey, appeals the decision of the Superior Court (Garfunkel, J.) granting the motion for partial summary judgment of the defendant, Dan's City Used Cars, Inc. d/b/a Dan's City Auto Body. We reverse and remand.

I. Background

The following facts are drawn from the record. In March 2009, the plaintiff brought suit against both his landlord, Colonial Village, and the defendant. In his writ, the plaintiff alleged that the defendant towed his 2004 Honda Civic pursuant to a parking policy at Colonial Village requiring tenants to move their cars during snowstorms. At the time, the plaintiff was confined to bed due to a serious medical condition and did not realize that his car had been towed. Soon thereafter, he was admitted to the hospital for a procedure to amputate his left foot, during which he suffered a heart attack. After returning home and learning that his car was missing, he had his attorney make inquiries into its location. His attorney learned that the defendant had possession of the car and had scheduled it to be sold at a public auction two days later. After the

attorney informed the defendant that his client wished to arrange for the return of his vehicle, the defendant falsely told the attorney that the car had been sold at public auction. The defendant later traded the car to a third party, but the plaintiff received no remuneration for his loss.

The plaintiff brought this lawsuit in 2009, alleging that the defendant violated: (1) the Consumer Protection Act, see RSA 358-A:2 (2009); (2) RSA chapter 262, a statute permitting a towing company to place a lien on a vehicle for reasonable charges incident to towing and storage and prescribing the requirements for collection of those charges by selling the vehicle at auction; and (3) the common law duty of a bailee to exercise reasonable care while in possession of a bailor's property. The trial court granted the defendant's motion for summary judgment on the grounds that a provision of the Federal Aviation Administration Authorization Act of 1994 (FAAAA), a federal law deregulating the trucking industry, preempted the plaintiff 's claims. See 49 U.S.C. § 14501(c)(1) (2006). This appeal followed.

II. Federal Preemption - General Principles

A moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III (2010). In reviewing the trial court's grant of summary judgment, we consider the

affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the non-moving party. Waterfield v. Meredith Corp., 161 N.H. 707, 709 (2011). If our review of that evidence discloses no genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law, we will affirm the grant of summary judgment. Id. The adverse party may not rest upon mere allegations or denials in his pleadings, but his response, by affidavits or by reference to depositions, answers to interrogatories, or admissions, must set forth specific facts showing that there is a genuine issue for trial. RSA 491:8-a, IV (2010). We review the trial court's application of the law to the facts de novo. Waterfield, 161 N. H. at 709.

We also review the trial court's statutory interpretation de novo. State v. Beauchemin, 161 N.H. 654, 658 (2011). Because the meaning of §14501(c)(1) is a question of federal law, we interpret it in accordance with federal policy and precedent. Cf. State v. Buchanan, 155 N.H. 505, 506 (2007). When interpreting a statute, we first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning. Beauchemin, 161 N.H. at 658. We do not read words or phrases in isolation, but in the context of the entire statutory scheme. New Hampshire Health Care Assoc. v. Governor, 161 N.H. 378, 385 (2011).

The Interstate Commerce Act, as amended by the FAAAA, 108 Stat. 1606 (1994), and the ICC Termination Act of 1995, 109 Stat. 899 (1995),

preempt states and their subdivisions from enacting or enforcing any law "related to a price, route, or service of any motor carrier with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). Towing companies, as entities that provide "motor vehicle transportation for compensation," 49 U.S.C. § 13102(14) (2006), are motor carriers under the terms of the act. Columbus v. Ours Garage & Wrecker Service, Inc., 536 U.S. 424, 430 (2002). Among the exceptions to the general preemption clause is § 14501(c)(2)(C), which provides that preemption does not apply to the authority of a state to enact or enforce laws relating to the price of towing services if such services are performed without the prior consent of the vehicle's owner.

Congress's goal in enacting § 14501(c)(1) and similar provisions affecting the airline and shipping industries was to help "assure transportation rates, routes, and services that reflect maximum reliance on competitive market forces, thereby stimulating efficiency, innovation, and low prices, as well as variety and quality." Rowe v. New Hampshire Motor Transp. Ass'n, 552 U.S. 364, 371 (2008) (quotations omitted). Its history reflects this free market economic goal. In 1994, over a decade after Congress had deregulated the trucking industry in 1980, see Motor Carrier Act of 1980, 94 Stat. 793 (1980), Congress precluded states from regulating the industry. See Federal Aviation Administration Authorization Act of 1994, 108 Stat. 1605-06; ICC Termination Act of 1995, 109 Stat. 899; see also 49 U.S.C. § 41713(b)(4)(A) (2006) (similar provision for combined motor-air carriers). In doing so, Congress intended to free motor carriers operating in

interstate commerce from unreasonably burdensome state and municipal regulations. See Ours Garage, 536 U.S. at 440 (citing H.R. Conf. Rep. No. 103-677, at 87 (1994) and Pub. L. 103-305 § 601(a)(1), 108 Stat. 1605).

Two general principles guide courts in the interpretation of express preemption provisions like § 14501(c)(1). "First, because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action. In all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (quotations and citations omitted). Second, "analysis of the scope of the statute's pre-emption is guided by [the] oft-repeated comment that the purpose of Congress is the ultimate touchstone in every pre-emption case." Id. (quotations omitted).

Federal precedent makes clear that the "relating to" language in § 14501(c)(1) is construed broadly. Cf. Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383-84 (1992). In Morales, the United States Supreme Court held that the Airline Deregulation Act (ADA), a law with a preemption

provision similar to § 14501(c)(1),[1] "pre-empts the States from prohibiting allegedly deceptive airline fare advertisements through enforcement of their general consumer protection statutes." Id. at 378. Several state attorneys general had developed, and sought to enforce against airlines, advertising guidelines that would satisfy state consumer protection laws. The Court reasoned that the phrase "related to" was "deliberately expansive" and adopted a standard that state actions would be preempted if they had "a connection with, or reference to" airline rates, routes, or services. Id. at 384. Under that standard, the states' attempts to impose substantive interpretations of their consumer protection laws upon airline rates constituted precisely the kind of regulation that Congress sought to displace when it deregulated the airline industry and enacted the preemption provision. See also Rowe, 552 U.S. at 371-73 (holding that § 14501(c)(1) preempts two provisions of a Maine law regulating the delivery of tobacco within the state; Maine's attempt to require tobacco retailers to employ only delivery companies that follow particular delivery service procedures created a direct "connection with" motor carrier services i.e., the transportation and delivery of goods).

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1 That provision, now codified at 49 U.S.C. § 41713(b) (2006), prohibits states from enacting or enforcing any law related to a price, route, or service of an air carrier. See also Rowe, 552 U.S.at 367-68.

Despite the expansive language of §14501(c)(1), its preemptive reach is not unlimited. As the Supreme Court in Morales made clear regarding the ADA, some state actions may affect motor carrier rates, routes, and services "in too tenuous, remote, or peripheral a manner to have preemptive effect." Morales, 504 U.S. at 390 (citing gambling and prostitution laws). Moreover, preemption may not apply where an interpretation of § 14501(c)(l) would give a motor carrier "carte blanche to lie and to deceive consumers" because Congress likely did not intend such a result. See id. at 390-91. While that fear was not present in Morales because the United States Department of Transportation retained the power to prohibit unfair pricing and advertising in the airline industry, other courts confronting disputes in this field have reasoned that Congress did not intend to leave private parties without any recourse against the tortious conduct of motor carriers and airlines. See, e.g., Charas v. Trans World Airlines, Inc., 160 F.3d 1259, 1266 (9th Cir. 1998). Courts must take care not to construe preemption provisions more broadly than Congress intended; they must, therefore, "look to the provisions of the whole law, and to its object and policy." Kelly v. Robinson, 479 U.S. 36, 43 (1986).

The Supreme Court has had no occasion to decide whether § 14501(c)(1) displaces state laws governing the manner in which a towing company may dispose of a vehicle to collect a debt secured by a lien. Our review of the precedents from other jurisdictions reveals mixed authority on that question. Compare Ware v. Tow Pro Custom Towing

and Hauling, 289 Fed. App'x 852, 856 (6th Cir. 2008) (holding conversion claims preempted, but declining to address argument under § 14501(c)(2)(C) the nonconsensual towing exception related to price because it was raised for first time on appeal), Weatherspoon v. Tillery Body Shop, Inc., 44 So. 3d 447, 458 (Ala. 2010) (holding preempted claims such as failure to investigate the identity of a vehicle's owner, improper sale, and failure to comply with state laws governing the notice and sale of abandoned vehicles), and A.J.'s Wrecker Service of Dallas v. Salazar, 165 S.W.3d 444, 449 (Tex. Ct. App. 2005) (holding claims based on towing company's allegedly improper towing were preempted), with Rhode Island Public Towing Ass'n v. State, No. 96-454ML, 1997 WL 135571, at *8 (D.R.I. Feb. 28, 1997) (regulation of storage rates held not preempted), and CPF Agency Corp. v. Sevel's 24 Hour Towing Serv., 34 Cal. Rptr. 3d 120 (Cal. Ct. App. 2005) (state statute regarding lien-sale-preparation fees held not preempted).

III. Application of § 14501(c)(1) to Plaintiff s Claims

Against this backdrop, the plaintiff contends that § 14501(c)(1) does not preclude his lawsuit because his writ presses claims that "relate to enforcement of a statutory lien involving the sale of the vehicle to collect money owed, and do not relate to transportation rates, routes, and services of a motor carrier." The defendant, on the other hand, argues that § 14501(c)(1) preempts all of the plaintiff's claims because they "all have a reference to, or a

connection with, the towing services provided by Dan's City."

We are convinced that § 1450l(c)(l) does not preempt state laws pertaining to the manner in which a towing company disposes of vehicles in its custody to collect towing and storage charges secured by a lien. As noted, we start with the presumption that "the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Wyeth v. Levine, 555 U.S. 555, 565 (2009). The Supreme Court in Morales noted that preemption occurs at least where state laws have a "significant impact" related to Congress's deregulatory objectives. Morales, 504 U.S. at 390. The purpose of enacting the FAAAA was to prevent states from imposing their own regulatory impediments on the trucking industry, thereby creating a patchwork of laws and undermining the operation of the free market. See Rowe, 552 U.S. at 371. In light of these principles and the FAAAA's purpose and text, several considerations in this case convince us that, in enacting § 14501(c)(1), Congress did not intend to displace state law causes of action challenging the manner in which custodians of towed vehicles dispose of them to collect towing and storage debts.

A

As an initial matter, the text of § 14501(c)(1) makes clear that preemption does not apply simply because state laws relate to the price, route, or service of a motor carrier in any capacity; rather, it applies only when state laws relate to the price,

route, or service of a motor carrier with respect to the transportation of property. See Ours Garage, 536 U.S. at 429 (noting that the FAAAA preempts state regulation "related to a price, route, or service of any motor carrier ... with respect to the transportation of property") (ellipses in original); id. at 449 (Scalia, J., dissenting) (observing that the modifying clause "with respect to the transportation of property" serves to "massively limit[ ] the scope of preemption"). The statute defines "transportation" to include "services related to th[e] movement [of property], including ... storage, handling, packing, unpacking, and interchange of ... property." 49 U.S.C. § 13102(23). The inclusion in the preemption provision of the clause "with respect to the transportation of property" follows naturally from Congress's deregulatory objectives; the goal was not to indiscriminately remove businesses that happen to operate as motor carriers from the traditional oversight of states as independent sovereigns in our system, but to prevent state laws from targeting motor carriers as movers of property for special treatment as to their prices, routes, or services. See Ours Garage, 536 U.S. at 449 (Scalia, J., dissenting). The activities listed in the statute are incidental to the movement of property; it would hardly make sense to preempt only state laws respecting the movement of things in commerce without also preempting state laws respecting other activities that are normally carried out in the course of transporting property (e.g., storage and handling).

Applying the statutory text to the facts and legal claims at issue, we conclude that the plaintiff's claims survive under the plain terms of § 14501(c)(1).

We note that the defendant has not identified with any clarity which provisions of RSA chapter 262 it believes are preempted. Without the benefit of moderately developed arguments containing specific reasons why individual provisions of that chapter should be preempted, we are not inclined to invalidate the entire chapter so far as it applies to towing companies. Cf. Independent Towers, WA v. State, Washington, 350 F.3d 925, 930 (9th Cir. 2003) ("Absent argument, we decline to pick through the many detailed sections and subsections in an effort to match the statutes and regulations with a preemption theory not articulated to us."). We thus confine our analysis to the provisions cited in the parties' briefs.

RSA chapter 262 prescribes the process by which a towing company may recover vehicle towing and storage costs. RSA 262:32 (2004 & Supp. 2011) authorizes removal and storage of vehicles under delineated circumstances including when vehicles have been stolen, abandoned, or appear unsafe to be driven. The next provision, RSA 262:33 (2004 & Supp. 2011), permits the towing company to place a lien on the vehicle for reasonable towing and storage charges, see RSA 262:33, I, and provides that the owner of the vehicle is entitled to recover the vehicle and a release of the lien upon payment of those charges, see RSA 262:33, II. If a vehicle is not claimed within thirty days after removal, the storage company may sell the vehicle at a public auction pursuant to RSA 262:36-a, :37 (2004 & Supp. 2011). In order to conduct an auction, however, RSA 262:38 (2004) requires the custodian to provide notice in "2 or more public places in the town or city where the

property is stored, at least 14 days before the sale and, if the value of the vehicle exceeds $100, by publishing the notice at least once in a newspaper of general circulation in the area."[2] The proceeds of the sale, after accounting for the amount of the liens and expenses incidental to the sale, must be distributed to the vehicle's owner. RSA 262:39 (2004).

The provisions of RSA chapter 262 are not state laws "with respect to the transportation of property"; they are state laws with respect to the collection of debts. When a towing company seeks to recover the costs incurred from towing and storing a vehicle, the manner in which it does so is not incidental to the movement of property by a motor carrier. Rather, it is incidental to the rights of property owners to recover their property, and the parallel obligations of the custodians of that property to accommodate the vehicle owners' rights – i.e., by providing notice and holding a public auction, and not engaging in deceptive conduct or acting negligently. Reading § 14501(c)(1) differently would unduly strain its plain terms and render the language "with respect to the transportation of property" meaningless. Cf. State v. Pierce, 152 N.H. 790, 791 (2005) ("All words of a statute are to be given effect, and the legislature is presumed not to use words that are superfluous or redundant."); Appeal of Barry, 142 N.H. 284, 287 (1997) (we will

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2 Notice by publication is not required, however, if the vehicle is more than five years old at the time of removal. RSA 262:36-a, I. The plaintiff's car was less than five years old when it was towed.

not interpret a statute so as to render its language meaningless). Furthermore, we can discern no reason why preempting state-based claims against towing companies arising out of their efforts to dispose of unclaimed vehicles promotes the deregulatory objective of § 14501(c)(1), nor a "clear and manifest purpose" in the FAAAA to displace private remedies against tow truck companies for conduct wholly unrelated to the transportation of property.

This reasoning applies with equal force to the plaintiff's common law negligence and Consumer Protection Act claims because they, too, arise out of the defendant's conduct in disposing of the plaintiff's vehicle. The plaintiff's negligence claim contends that the defendant violated its duty as a bailee to take reasonable care of the property in its custody and ensure its return to the bailor. Similarly, the CPA claim alleges that, by misrepresenting the status of the plaintiff's vehicle in response to his counsel's inquiry and disposing of the vehicle by trading it instead of taking adequate measures to ensure its return to the plaintiff, the defendant committed an "unfair or deceptive act or practice in the conduct of any trade or commerce." RSA 358-A:2 (2009). Those claims have nothing to do with the transportation of property; they involve the balance of rights between a lien creditor, who is entitled to recover the value of the debt, and the owner of a towed vehicle, who is entitled to recover either the vehicle after paying the appropriate costs or the remainder of the vehicle's value once the creditor has sold it in accordance with the terms of RSA chapter 262. As with the plaintiff's claims under RSA

chapter 262, allowing these two claims to proceed against the defendant does not "significantly impact" Congress's deregulatory objectives or impose upon the trucking industry a patchwork of different standards relating to price, route, or service. Common-law torts like negligence establish baseline rules of acceptable conduct common to all. See American Airlines, Inc. v. Wolens, 513 U.S. 219, 236-37 (1995) (Stevens, J., concurring in part and dissenting in part) ("[T]he standard of ordinary care is a general background rule against which all individuals order their affairs."). Furthermore, the Consumer Protection Act does not significantly affect Congress's goals under the facts of this case because it governs the manner in which a company in possession of a towed vehicle may dispose of the vehicle to collect on a debt created by operation of state law – a regulatory subject far removed from Congress's aim of promoting free markets and equalizing the competitive playing field between motor carriers and air carriers. Cf. Cole v. City of Dallas, 314 F.3d 730, 734 (5th Cir. 2002) ("Congress intended to divorce the motor carrier industry from state and local economic regulation in order to provide motor carriers ... the same competitive advantages enjoyed by air carriers ...."); see H.R. Conf. Rep. No. 103-677, at 85, 87 (1994), reprinted in 1994 U.S.C.C.A.N. 1715, 1757, 1759.

B

Even assuming the plaintiff's claims rest on state laws "with respect to the transportation of property," another statutory ground supports the

conclusion that § 14501(c)(1) does not preempt them. The state laws upon which the plaintiff relies in his writ including the notice and auction requirements of RSA chapter 262, common law negligence, and the Consumer Protection Act are, at least as they apply to the defendant's allegedly wrongful actions in disposing of the plaintiff's vehicle to recover its storage and towing costs, not sufficiently related to a towing company's "service" to be preempted under § 14501(c)(1). Cf. Morales, 504 U.S. at 390. Although the ordinary meaning of the phrase "relating to" is a broad one, it is not so broad as to encompass all possible private civil claims against any motor carrier.

To begin with, the provisions of RSA chapter 262 – requiring towing companies to attempt to identify the owner of a towed vehicle, make reasonable efforts to secure its return to the owner, and comply with the statute's notice and auction-related provisions – are too remotely related to a motor carrier's service. The "service" of a towing company is the moving of vehicles. For consensual towing, the company moves a vehicle from one place to another; for nonconsensual towing, the company removes a vehicle from a place where it does not belong. Cf. Charas, 160 F.3d at 1265-66 ("'[S]ervice' ... refers to such things as the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided.... To interpret 'service' more broadly is to ignore the context of its use; and, it effectively would result in the preemption of virtually everything an airline does."); Hodges v. Delta Airlines, Inc., 44 F.3d 334, 336 (5th Cir. 1995) (defining service more

broadly than in Charas but also holding negligence claim against airline not preempted). The manner in which a towing company may auction another person's property to collect on a debt relates to post-service debt collection — an area of the company's affairs falling well outside its service of towing vehicles. This conclusion has additional force in this case because the defendant has sought the benefit of state law allowing it to claim a lien on a vehicle in its possession, see RSA 262:33, I, but now seeks to avoid the inconvenience of providing adequate notice and conducting an auction as required by state law. Notwithstanding that RSA chapter 262 may affect the towing company's general "service" indirectly by imposing time and notice constraints on debt collection, those constraints do not bear the requisite nexus to the business of towing of vehicles to overcome the presumption that Congress does not intend to displace laws operating in a field of traditional state authority. Cf. Wolens, 513 U.S. at 237 n.2 (Stevens, J., concurring in part and dissenting in part) ("Indeed, every judgment against an airline will have some effect on rates, routes, or services, at least at the margin.").

Similarly unavailing is the defendant's argument that the plaintiff's common law negligence claim, based upon the towing company's duty as a bailee, relates to the towing company's service. As the defendant recognizes, many courts have concluded that personal injury tort claims are not preempted under § 14501(c)(1) or its mirror provision applying to air carriers notwithstanding that tort claims may relate in some peripheral way to a motor carrier's "service." The Ninth Circuit Court of

Appeals, for example, allowed such claims to proceed in Charas. That case called on the court to decide whether the Airline Deregulation Act preempted personal injury claims against an airline resulting from an accident involving a beverage cart which caused the dislocation of a passenger's shoulder, and other similar claims. The court concluded that it did not, reasoning that the "service" of an airline does not refer to "the pushing of beverage carts, keeping the aisles clear of stumbling blocks, the safe handling and storage of luggage, assistance to passengers in need, or like functions." Charas, 160 F.3d at 1266. Other courts have similarly held certain personal injury and other tort claims not preempted because they are too tangentially related to the service of an air or motor carrier. See, e.g., Smith v. Comair, 134 F.3d 254 (4th Cir. 1998) (state law claim against airline for false imprisonment and intentional infliction of emotional distress not preempted because they are too tenuously related to airline's services); Taj Mahal Travel, Inc. v. Delta Airlines, Inc., 164 F. 3d 186,194 (3d Cir. 1998); Somes v. United Airlines, Inc., 33 F. Supp. 2d 78, 83 (D. Mass. 1999); Sedigh v. Delta Airlines, Inc., 850 F. Supp. 197, 200 (E.D.N.Y. 1994); Paredes v. Air-Serv Corp., Inc., 251 P.3d 1239, 1248 (Colo. App. 2010); cf. Continental Airlines Inc. v. Kiefer, 920 S.W.2d 274, 282-83 (Tex. 1996) (reasoning that negligence claims relate to airline service but are policy-neutral and therefore not preempted); Kuehne v. United Parcel Service, 868 N.E.2d 870, 876 (Ind. Ct. App. 2007) (reasoning that, unlike negligence claims against motor carrier involving delivery process before a parcel reaches its destination, a negligence claim

based on negligent delivery does not relate to service).

The reasoning of those cases holding personal injury and other tort claims not preempted applies with equal force to tort claims arising from the deprivation of the use of one's property, as long as the application of those tort principles remains only tangentially related to a motor or air carrier's services. To the extent that the plaintiff in this case has alleged an injury to his property rather than his person, we find little material difference between the two. Had the errant beverage cart in Charas ripped a hole in the passenger's luggage instead of dislocating his shoulder, his ensuing negligence claim would bear no greater relation to the airline's service than the claims asserted here. Not only do the plaintiff's negligence claims themselves bear only a remote connection to the defendant's "service," but they also arise out of the defendant's act of disposing of the vehicle – not towing it.

The same reasoning applies to the plaintiff's Consumer Protection Act claim, see RSA 358-A:2 (2009), because, as alleged here, it arises out of the obligation to not act unfairly or deceptively in disposing of — not transporting — a vehicle under the care of a towing company. Unlike in Morales, where the Supreme Court decided that the state law guidelines could not be imposed upon airline advertising, here the CPA claims are asserted against a towing company based not upon its role as an entity that tows vehicles (or the price, route, or service relating to that role), but upon its role as a custodian of another person's property after the

towing has been completed. The state's substantive requirement to refrain from unfair or deceptive practices in that role has little to do with a towing company's service of removing vehicles from where they are not permitted to be.

We note, finally, that the absence of any federal remedy for private injuries of the kind allegedly suffered by the plaintiff also supports the inference that Congress did not intend to displace the operation of state laws in this context. See Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 251 (1984) (observing that "[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct"); Kuehne, 868 N.E.2d at 877-78; Margolis v. United Airlines, Inc., 811 F. Supp. 318, 324-25 (E.D. Mich. 1993). This is not a situation in which a plaintiff has sought to enforce state laws and regulations affecting the everyday operation of a towing company in its capacity as a mover of property. Fairly read, the theories upon which the plaintiff's claims rest advance the right of a person whose vehicle has been towed to retrieve it upon payment of the towing and storage costs. Although the lack of a parallel federal remedy for tortious or otherwise unlawful conduct by towing companies in the management and disposition of towed vehicles does not require the conclusion that Congress did not intend preemption in this context, cf. Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters, 436 U.S. 180, 203 (1978) (noting that "[t]o allow the exercise of state jurisdiction in certain contexts might create a significant risk of misinterpretation of federal law and the consequent

prohibition of protected conduct" but holding that National Labor Relations Act does not preempt state enforcement of laws prohibiting violence, defamation, and intentional infliction of emotional distress), it does militate strongly against reading § 14501(c)(1) so expansively as to encompass everything a towing company might do in the course of its business, as we read the defendant's brief to assert. Cf. Charas, 160 F.3d at 1266.

We part ways with the Alabama Supreme Court's decision in Weatherspoon, 44 So. 3d 447, which reasoned that "the failure of Congress to provide an alternative remedy upon preemption is [no] basis for finding that [the plaintiff's] claims are not preempted." Id. at 457 n.4. While it is true that the absence of a remedy alone is no bar to preemption if Congress has manifested a clear intention to immunize certain activities from state law causes of action, see e.g., Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 584 (1981), the United States Supreme Court has made clear that the absence of a remedy is relevant to understanding the intended scope of a federal statute's express preemption provision. See Silkwood, 464 U.S. at 251; United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656, 663-64 (1954) (expressing concern that a finding of preemption would effectively grant union "immunity from liability for their tortious conduct"); see also Taj Mahal, 164 F.3d at 194 ("It is highly unlikely that Congress intended to deprive passengers of their common law rights to recover for death or personal injuries sustained in air crashes."). The lack of a remedy is particularly strong evidence that Congress did not intend such a broad scope of

preemption in light of the presumption that Congress does not "cavalierly" displace state laws in an area of traditional state authority. As the Supreme Court stated in Ours Garage, 536 U.S. at 432, 439, Congress's purpose behind § 14501(c)(1) was to preempt states' economic authority over motor carriers of property, not to supersede the traditional state police power absent a "clear and manifest" intention to do so.

IV. Conclusion

For the reasons stated above, we conclude that the plaintiff's action for wrongful disposition of his vehicle under state law is not preempted under 49 U.S.C. § 14501(c)(l).

Reversed and remanded.

DALIANIS, C.J., and HICKS and CONBOY, JJ., concurred.

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT SUPERIOR COURT

Robert Pelkey

v.

Dan's City Used Cars, Inc. d/b/a/ Dan's City Auto Body and Colonial Village, Inc.

Docket No. 09-C-241

ORDER ON DAN'S CITY MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND MOTION TO DISMISS

Dan's City Used Cars, Inc. d/b/a Dan's City Auto Body ("Dan's City") has filed two motions for partial summary judgment and a motion to dismiss in relation to the plaintiff's remaining claims against it: negligence and violation of the Consumer Protection Act ("the CPA"). The plaintiff objects. Based on the parties' pleadings as well as the applicable law, the court finds and rules as follows.

A. Background

The facts of this case have been set out in a prior order of this court. See Order dated February 9,

2010 (O'Neill, J.). The court, however, will briefly summarize the undisputed facts. At the time of the events in question, the plaintiff was a tenant of Colonial Village, an apartment complex located in Manchester, New Hampshire and owned by defendant Colonial Village. Colonial Village's snow removal policy requires tenants to move their vehicles to accommodate snow removal from the parking lot during and after a snow event. If vehicles are not moved consistent with the terms of the policy, the tenant's vehicle may be towed at the owner's expense.

On Saturday, February 3, 2007, it was snowing. Dan's City towed the plaintiff's vehicle from the Colonial Village parking lot.

On March 12, 2007, Dan's City filed a Notice to the Director of Removal" with the New Hampshire Department of Safety requesting permission to sell the plaintiff's vehicle at auction without notice. The notice stated that the market value of the vehicle was under $500 and the vehicle was not in condition for legal public way use. On March 29, 2007, the Division of Motor Vehicles notified Dan's City that the last known owner of the vehicle was the plaintiff.

Dan's City sent the plaintiff a letter notifying him that it had towed and was storing his vehicle. The letter was returned by the Post Office and the box "moved, left no address" was checked.

The plaintiff has been hospitalized in 2006, and was hospitalized again on February 12, 2007. After the plaintiff was released from the hospital, Colonial Village's legal counsel told the plaintiff's

legal counsel that plaintiff's vehicle had been towed by Dan's City and was scheduled to be sold at public auction on April 19, 2007. Prior to the scheduled auction, plaintiff's legal counsel contacted Dan's City and advised that the plaintiff wanted to pay any charges owed and reclaim his vehicle.

Ultimately, Dan's City disposed of the car through trade.

B. Analysis

Dan's City has advanced several arguments in support of its request for summary judgment and/or dismissal. However, the court need only address the issue of federal preemption because it finds that all of plaintiff's remaining claims are preempted by federal law.

As a preliminary matter, the plaintiff argues that Dan's City failed to raise the issue of preemption in a timely manner and therefore this defense is waived pursuant to Superior Court Rule 28. The court disagrees.

Dan's City argued federal preemption in its motion to dismiss and in its motion for summary judgment. Motions for summary judgment are not subject to the time limits imposed by Rule 28. Thus, Dan City's motion for summary judgment on the basis of federal preemption is not untimely.

Even if Rule 28 does apply to Dan's City's claim of federal preemption, Dan's City provided proper notice pursuant to that rule. Dan's City filed a timely Special Plea and Brief Statement on May 29, 2009. On April 27, 2010, Dan's City filed a

Motion to Amend Brief Statement and its Third Amended Special Plea and Brief Statement, which included a claim that "one or more of Plaintiff's claims are preempted by U.S.C.A. § 14501. The court (Abramson, J.) granted Dan City's motion on May 18, 2010 without objection.

Rule 28 permits the filing of brief statements and special pleas later than 30 days after the return date "by leave of court as justice may require." The court therefore finds that Dan's City provided proper and timely notice of its federal preemption claim under Rule 28.

"Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III (1997). "An issue of fact is 'material' for purposes of summary judgment if it affects the outcome of the litigation under the applicable substantive law." Dent v. Exeter Hosp., Inc., 155 N.H. 787, 792 (2007).

On August 23, 1994, Congress, exercising its powers under the Commerce Clause, enacted 49 U.S.C. §14501(c), which generally deregulated the intrastate motor freight industry. The statute. states in relevant part:

> Motor carriers of property. (1) General Rule. Except as provided in paragraphs (2) and (3), a State, political subdivision

> of a State, or political authority to 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.

49 U.S.C. §14501(c)(1)(2005).

A "motor carrier" is defined as "a person providing motor vehicle transportation for compensation." 49 U.S.C. §13102(14). "Motor vehicle transportation by a tow truck for the compensation of the tow truck company . . . places the towing compan[y] within .the definition of a 'motor carrier.'" R. Mayer of Atlanta, Inc. v. City of Atlanta, 158 F.3d 538, 543 (11th Cir. 1998), *disapproved in part on other grounds in* Ware v. Tow Pro Custom Towing and Hauling, Inc., 2007 WL 108885 (M.D. Tenn. 2007). Thus, Dan's City is a "motor carrier" under 49 U.S.C. §14501(c).

The preemption doctrine of the Supremacy Clause of the United States Constitution states that "the laws of the United States . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." U.S. CONST. art. VI, cl. 2. Thus, state law that conflicts with federal law is "without effect." Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992)(citation omitted). When applying the Supremacy Clause, courts are to "assum[e] that the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that was the

clear and manifest purpose of Congress." Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)(citation omitted).

"[U]nder the plain, ordinary meaning of the terms used in §14501(c)(1), the federal statute expressly preempts state and municipal ordinances that regulate the prices, routes, or services provided by towing companies." R. Mayer, 158 F.3d at 543; see City of Columbus v. Ours Garage & Wrecker Serv., Inc., 536 U.S. 424, 430 (2002). If Congress had not intended for §14501(c)(1) to preempt state and local regulation of towing services generally, Congress would not have included an express exemption that applies solely to the prices charged for nonconsensual towing services. Harris County Wrecker Owners for Equal Opportunity v. City of Houston, 943 F. Supp. 711, 722 (S.D.Tex.1996), *abrogated in part on other grounds in* Stucky v. City of San Antonio, 260 F.3d 424 (5th Cir. 2001); see 49 U.S.C. §14501(c)(2)(C).

The Supreme Court has concluded that preemption under §14501(c)(1) is broad and far-reaching. See Rowe v. New Hampshire Motor Transp. Ass'n., 552 U.S. 364 (2008). In Rowe, the Supreme Court, based on the language of §14501(c)(1) and on its previous decisions, examined the broad-reaching nature of the preemption effectuated by the statute. The Court focused on Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992), which interpreted identical preemption language from the Airline Deregulation Act of 1978, 49 U.S.C.App. §§1302(a)(4) and 1302(a)(9). The Rowe Court explained: "In Morales, the Court

determined: (1) that [s]tate enforcement actions *having a connection with, or reference to* carrier rates, routes, or services are preempted; (2) that such preemption may occur even if a state law's effect on rates, routes or services is only indirect; (3) that, in respect to preemption, it makes no difference whether a state law is consistent or inconsistent with federal regulation; and (4) that preemption occurs at least where state laws have a significant impact related to Congress' deregulatory and preemption-related objectives." Rowe, 552 U.S. at 370-71 (quotations and citations omitted) (emphasis in the original).

Morales held that, given these principles, federal law preempts States from enforcing their consumer protection statutes against deceptive airline fare advertisements. Morales, 504 U.S. at 391; see also American Airlines, Inc. v. Wolens, 513 U.S. 219, 226-228 (1995) (holding federal law preempts application of a State's general consumer protection statute to an airline's frequent flyer program). Relying on the authority of Morales, the Rowe Court held that §14501(c)(1), in the same manner, preempted the state regulation before it. Rowe, 552 U.S. at 365.

In A.J.'s Wrecker Service of Dallas, Inc. v. Salazar, 165 S.W.3d 444 (Tex. Ct.App. 2005), the plaintiff's car was towed from an apartment parking lot by the defendant. Id. at 446. The defendant notified the plaintiff that it had possession of her car. After a period of approximately sixty (60) days, the plaintiff obtained her car from the defendant and filed suit alleging negligence per se, conversion, civil

theft, and trespass to chattel. Id. The defendant argued that the plaintiff's claims were preempted by §14501(c)(1). Id.

The Salazar court reasoned that "trespass to chattel, conversion, and civil theft have elements closely related to AJ's non-consensual towing service. Towing cars without the owners[sic] consent is one of the services AJ's provides." Id. at 449. The Salazar court held that the plaintiff's claims arose directly from the defendant's service of towing cars. Id. The court concluded that the plaintiff's tort claims constituted the enactment or enforcement of a state law related to a motor carrier's prices, routes, or services and thus held that the plaintiff's claims were preempted by federal law. Id.

Similarly, in Weatherspoon v. Tillery Body Shop, Inc., 44 So.3d 447 (Ala. 2010), the owner of a vehicle that had been deemed abandoned brought an action against the towing company that towed and auctioned the vehicle, alleging negligence and wantonness, statutory deprivation of possession, recover of chattel in specie, conversion, negligent and wanton supervision, and fraudulent suppression. Id. at 448. The court reasoned that the vehicle owner's claims related specifically to the towing company's handling of the vehicles it towed, and expressly sought the enforcement of state laws related to duties owed stemming from the transportation of property. Id. at 458. The court held that the vehicle owner's state law claims against the towing company were preempted by 49 U.S.C. §14501(c)(1). Id.

Here, it is undisputed that Dan's City is a motor carrier of property subject to the provisions of

§14501(c)(1). See Weatherspoon, 44 So.3d at 451. Based on the claims asserted in the plaintiff's complaint, the plaintiff seeks enforcement of state law related to Dan's City's services. Specifically, the plaintiff alleges that Dan's City violated the CPA by engaging in deceptive acts including making false statements regarding the value of the plaintiff's vehicle, the condition of the plaintiff's vehicle, and that the vehicle had been abandoned. Additionally, the plaintiff alleges that Dan's City violated the CPA by failing to inquire into the identity of the owner of the vehicle, failing to follow the procedures set forth in RSA 262, and failing to cancel a scheduled public auction when the identity of the owner and the circumstance were made know to Dan's City. In relation to his negligence claim, the plaintiff alleges that "Dan's City had a statutory duty under RSA 262, as well as a common law duty as a bail[ee],[3] to use reasonable care to ascertain the identity of the owner . . . and to use reasonable care in disposing of the automobile." Writ, ¶25.

The plaintiff's claims, therefore, relate to Dan's City's retention of a towed vehicle without notifying him; Dan's City's alleged sale of the towed vehicle as an abandoned vehicle under New Hampshire law; and Dan's City's alleged failure to comply with state requirements regarding Dan's

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3 The plaintiff uses bailor in reference to Dan's City. However, the correct term is bailee, [a] person who receives personal property from another, and has possession of but not title to the property. Black's Law Dictionary 161 (9th ed.)

City's towing and handling of abandoned vehicles. See Weatherspoon, 44 So.4d at 458. These claims relate specifically to Dan's City's "handling of the vehicles it tows, i.e., its service regarding the property it transports, and expressly seek the enforcement of state laws related to duties owed stemming from the transportation of property." Id.

The Court finds that the plaintiff's claims against Dan's City relate to Dan's City's service and therefore fall within the scope of claims preempted by §14501(c)(1).

Once it is acknowledged that the state law at issue relates to a price, route, or service of the towing industry, the plain language of §14501(c)(1) preempts it, unless an exception to preemption applies. See Petrey v. City of Toledo, 246 F.3d 548, 559 (6th Cir. 2001), *disapproved on other grounds in* City of Columbus v. Ours Garage and Wrecker Service, Inc., 536 U.S. 424 (2002). The relevant exception to the general preemption rule, §14501(c)(2)(C), permits a "State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to *the price* of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle." 49 U.S.C. §14501(c)(2)(C) (emphasis added).

When examining the meaning of a statute, the court begins its analysis "with the language employed by Congress and the assumption that the ordinary meaning of the language accurately expresses the legislative purpose." R. Mayer, 158

F.3d at 543 (citing Morales, 504 U.S. at 383). The court assumes that Congress used the words in a statute as they are commonly and ordinarily understood and reads the statute to give full effect to each of its provisions. United States v. McLymont, 45 F.3d 400, 401 (11th Cir. 1995).

According to the plain language of §14501(c)(2)(C), the exception relates only to *the price* of nonconsensual transportation by a tow truck. The plaintiff's claims against Dan's City relate to its acts of towing and selling the plaintiff's vehicle and not to the price Dan's City charged for those services. Weatherspoon, 44 So.3d at 459. Accordingly, the plaintiff's claims are not exempted from preemption under §14501(c)(2)(C).

For the foregoing reasons, Dan's City's motion for summary judgment is GRANTED. Because the court has granted Dan City's motion for summary judgment, its motion to dismiss is now dismissed as moot.

SO ORDERED.

December 17, 2010

/s/ David A. Garfunkel
David A. Garfunkel
Presiding Justice

NEW HAMPSHIRE REVISED STATUTES
ANNOTATED ("RSA")

Chapter 262 Antitheft Laws, Offenses, Penalties, Habitual Offenders, Arrest of Nonresidents and Abandoned Vehicle

RSA 262:36-a Disposal by Storage Company.

I. If the owner of a motor vehicle removed or stored pursuant to RSA 262:33 or RSA 262:40-a does not claim the vehicle within 30 days, and the vehicle is more than 5 model years old at the time of removal, the storage company may dispose of such vehicle after giving notice pursuant to RSA 262:38, provided that no notice by publication shall be required.

II. If the vehicle is 5 model years old or less at the time of removal and the vehicle has not been claimed within 30 days, the storage company may dispose of such vehicle after giving notice pursuant to RSA 262:38.

III. If the vehicle is no longer intended or in condition for legal use on the ways of the state, the storage company may dispose of the vehicle in less than 30 days and without the notice required by RSA 262:38 and RSA 444 upon written notice to the director and approval by the director subject to such rules as he shall adopt.

RSA 262:37 Sale Authorized.

If the vehicle shall have been stored pursuant to this subdivision and all the requirements of RSA 262:36 have been met, the custodian of the vehicle may sell the same, at his place of business at public auction, for cash.

RSA 262:38 Notice of Sale.

Notice of sale shall be given by posting notices thereof in 2 or more public places in the town or city where the property is stored, at least 14 days before the sale and, if the value of the vehicle exceeds $100, by publishing the notice at least once in a newspaper of general circulation in the area. If the last place of abode of the owner of such vehicle is known to or may be ascertained by such garage owner or keeper by the exercise of reasonable diligence, a notice of the time and place of the sale shall be given by the garage owner by registered or certified mail, or in person, at least 14 days prior to the sale.

RSA 262:39 Application of Proceeds.

The balance of the proceeds of sale, if any, after payment of the amount of the liens and the reasonable expenses incident to the sale, shall be paid to the owner of such vehicle or his legal representative if claimed at any time within one year from the date of sale. If such balance shall not be claimed within said period, it shall be paid into the state treasury for the use of the state.

RSA 262:40-a (IV) Vehicles Removed From Private and State Property; Conspicuous Notice in Parking Lots and Garages.

The costs of removing a vehicle under this section, including towing costs, shall, consistent with RSA 262:35-a, be the responsibility of the last registered owner according to department records. If a vehicle is towed from a parking lot or parking garage, charges for removal and storage shall not be assessed against the vehicle owner unless there is posted in the parking lot or parking garage conspicuous notice that illegally parked vehicles are subject to towing at the owner's expense.

CHAPTER 358-A Regulation of Business Practices for Consumer Protection

RSA 358-A:2 Acts Unlawful.

It shall be unlawful for any person to use any unfair method of competition or any unfair or deceptive act or practice in the conduct of any trade or commerce within this state. Such unfair method of competition or unfair or deceptive act or practice shall include, but is not limited to, the following:

I. Passing off goods or services as those of another;

II. Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

III. Causing likelihood of confusion or of misunderstanding as to affiliation, connection or association with, or certification by, another;

IV. Using deceptive representations or designations of geographic origin in connection with goods or services;

V. Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that such person does not have;

VI. Representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or secondhand;

VII. Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;

VIII. Disparaging the goods, services, or business of another by false or misleading representation of fact;

IX. Advertising goods or services with intent not to sell them as advertised;

X. Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

X-a. Failing to disclose the legal name, street address, and telephone number of the business under RSA 361-B:2-a;

XI. Making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions; or

XII. Conducting or advertising a going out of business sale:

(a) Which lasts for more than 60 days;

(b) Within 2 years of a going out of business sale conducted by the same person at the same location or at a different location but dealing in similar merchandise;

(c) Which includes any goods, wares, or merchandise purchased or received 90 days prior to commencement of the sale or during the duration of the sale and which are not ordinarily sold in the seller's course of business;

(d) Which includes any goods, wares, or merchandise ordered for the purpose of selling or disposing of them at such sale and which are not ordinarily sold in the seller's course of business;

(e) Which includes any goods, wares, or merchandise consigned for the purpose of selling or disposing of them at such sale;

(f) Without conspicuously stating in any advertisement for any such sale, the date such sale is to commence or was commenced;

(g) Upon the conclusion of which, that business is continued under the same name or under a different name at the same location; or

(h) In a manner other than the name implies.

XIII. Selling gift certificates having a face value of $100 or less to purchasers which contain expiration dates. Gift certificates having a face value in excess of $100 shall expire when escheated to the state as abandoned property pursuant to RSA 471-C. Dormancy fees, latency fees, or any other administrative fees or service charges that have the

effect of reducing the total amount for which the holder may redeem a gift certificate are prohibited. This paragraph shall not apply to season passes.

XIV. Pricing of goods or services in a manner that tends to create or maintain a monopoly, or otherwise harm competition.

OPPOSITION BRIEF

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Supreme Court, U.S.
FILED
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SUPREME COURT, U.S.

No. 12-52

IN THE
Supreme Court of the United States

DAN'S CITY USED CARS, INC. D/B/A DAN'S CITY AUTO BODY.

Petitioner,

v.

ROBERT PELKEY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Hampshire

Respondent's Brief in Opposition

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November 2012

QUESTION PRESENTED

Whether 49 U.S.C. § 14501(c)(1), which preempts state laws "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property," preempts negligence and consumer protection law claims based on the manner in which a towing company disposed of a vehicle to collect a debt secured by a lien.

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INTRODUCTION

This case involves a towing company that failed to inform a towed vehicle's owner that it planned on auctioning the car, held an auction to sell the car even after the owner explained the car was not abandoned, lied to the owner about whether the car had been sold, and traded the car for its own benefit without compensating the owner for the car's value. The question presented is whether the towing company can be held liable for its actions under state law, or whether the owner's state-law claims are preempted by 49 U.S.C. § 14501(c)(1), which preempts state laws "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." In a thorough decision, the New Hampshire Supreme Court below reversed a grant of summary judgment for the defendant and held that § 14501(c)(1) does not preempt the plaintiff's state-law claims because they neither relate to motor carrier services nor are "with respect to the transportation of property." The decision below is correct, the Court lacks jurisdiction to review the decision because it is not a final judgment, and further review of this case is unwarranted.

STATEMENT OF THE CASE

A. Factual Background

On February 3, 2007, defendant Dan's City towed plaintiff Robert Pelkey's 2004 Honda Civic from the parking lot of his apartment complex without his knowledge. Pet. App. 2, 23. The car was towed pursuant to a policy at the complex that required tenants to move their cars during snowstorms. At the time of the towing, Mr. Pelkey was confined to bed due to a serious medical condition. *Id.* at 2. The car was parked in a designated handicap parking spot, displayed a valid and current

handicap license plate, was properly registered, and displayed a current parking sticker issued by the apartment complex. N.H. S. Ct. Pl.'s App. 18.

Soon after the towing, Mr. Pelkey was admitted to the hospital to have his foot amputated. While at the hospital, he suffered a heart attack, and he was not discharged for almost two months. Pet. App. 2.

While Mr. Pelkey was in the hospital, Dan's City sought permission from the New Hampshire Department of Safety to sell the car without notice as an abandoned or unclaimed motor vehicle. Although the car had fewer than 8,000 miles and a blue book value of approximately $12,000, Dan's City claimed that the car's market value was under $500. N.H. S. Ct. Pl.'s App. 20. The Department of Safety told Dan's City that it had to provide Mr. Pelkey with notice of the sale and provided Mr. Pelkey's address. N.H. S. Ct. Def.'s App. 67. Instead of sending Mr. Pelkey notice of the sale, however, Dan's City sent him a certified letter stating that it had towed his vehicle and that, if he did not contact it within 14 days, Dan's City would inform the police that he had abandoned his vehicle. Because of Mr. Pelkey's lengthy hospitalization, the letter was returned, and Dan's City made no further efforts to contact Mr. Pelkey and provide notice to him. Pet. App. 24.

Upon returning home from the hospital, Mr. Pelkey discovered that his car was not in his apartment complex's parking lot. His lawyer contacted the complex and was told that the car had been towed and was scheduled to be sold two days later. Mr. Pelkey's lawyer faxed a letter to Dan's City, explaining that Mr. Pelkey had been in the hospital, that his car was not abandoned, and that he wanted to arrange for the vehicle's return. N.H. S. Ct. Pl.'s App. 20.

Despite being told that Mr. Pelkey wanted to arrange for the return of the car, Dan's City went forward with the auction. No third party bid on the car, so it remained in Dan's City's possession. Nonetheless, when Mr. Pelkey's lawyer made further inquiries about returning the car, Dan's City falsely told him that the car had been sold. Pet. App. 3. Dan's City later traded the car to a third party, without Mr. Pelkey receiving any compensation for the loss of his car. *Id.*

B. Proceedings Below

Mr. Pelkey filed suit against Dan's City, alleging, as relevant here, that Dan's City's engaged in deceptive acts that violated the New Hampshire Consumer Protection Act and that it breached duties to Mr. Pelkey, such as the duty to use reasonable care in disposing of the vehicle. N.H. S. Ct. Pl.'s App. 21. The superior court granted summary judgment to Dan's City, holding that Mr. Pelkey's claims were preempted by 49 U.S.C. § 14501(c)(1), which preempts state laws "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." Pet. App. 23-33.

The New Hampshire Supreme Court reversed, holding that "§ 14501(c)(1) does not preempt state laws pertaining to the manner in which a towing company disposes of vehicles in its custody to collect towing and storage charges secured by a lien." *Id.* at 10. The court rested its opinion on two separate grounds.

First, the court noted that "the text of § 14501(c)(1) makes clear that preemption does not apply simply because state laws relate to the price, route, or service of a motor carrier *in any capacity*; rather it applies only when state laws relate to the price, route, or service of a motor carrier *with respect to the transportation of*

property." *Id.* at 10-11 (emphasis in original). The court concluded that the state laws at issue were not "with respect to the transportation of property." *Id.* at 13-14. "When a towing company seeks to recover the costs incurred from towing and storing a vehicle," it explained, "the manner in which it does so is not incidental to the *movement* of property by a motor carrier." *Id.* at 13; *see* 49 U.S.C. § 13102(23) (defining transportation to include "services related to th[e] movement [of property]"). "Rather, it is incidental to the rights of property owners to recover their property, and the parallel obligations of the custodians of that property to accommodate the vehicle owners' rights." Pet App. 13. "Reading § 14501(c)(1) differently would unduly strain its plain terms and render the language 'with respect to the transportation of property' meaningless." *Id.*; *see also id.* at 14 ("Those claims have nothing to do with the *transportation* of property; they involve the balance of rights between a lien creditor, who is entitled to recover the value of the debt, and the owner of a towed vehicle, who is entitled to recover either the vehicle after paying the appropriate costs or the remainder of the vehicle's value once the creditor has sold it[.]" (emphasis in original)).

Second, the court held that even if Mr. Pelkey's claims rested on state laws "with respect to the transportation of property," they were not sufficiently related to a motor carrier's "service" to be preempted under § 14501(c)(1). Pet. App. 16. "The 'service' of a towing company," it explained, "is the moving of vehicles." *Id.* The court noted that Mr. Pelkey's negligence claims bore "only a remote connection to the defendant's 'service,'" and arose not from defendant's towing of the car, but from its disposal of it. *Id.* at 19. As for the Consumer Protection Act claims, the court noted that they were asserted against Dan's City

"based not upon its role as an entity that tows vehicles (or the price, route, or service relating to that role), but upon its role as a custodian of another person's property after the towing has been completed." *Id.* at 19-20. "The state's substantive requirement to refrain from unfair or deceptive practices in that role," the court continued, "has little to with a towing company's service of removing vehicles from where they are not permitted to be." *Id.* at 20.

In concluding, the court observed that the lack of a federal remedy militated "against reading § 14501(c)(1) so expansively as to encompass everything a towing company might do in the course of its business," and against reading it to cover Mr. Pelkey's claims, which "advance the right of a person whose vehicle has been towed to retrieve it upon payment of the towing and storage costs." Pet. App. 20.

Having found Mr. Pelkey's claims not preempted because the state laws at issue were not related to a towing company's "service" or "with respect to the transportation of property," the court did not consider the application of 49 U.S.C. § 14501(c)(2)(C), which states that § 14501(c)(1) does not apply to a state's authority to enforce a law "relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle."

REASONS FOR DENYING THE WRIT

I. The Court Lacks Jurisdiction To Review The Non-Final State-Court Decision Below.

The Court lacks jurisdiction over this case. Petitioner claims this Court has jurisdiction under 28 U.S.C. § 1254(1). Pet. 1. Section 1254, however, governs review of cases in the federal courts of appeals. Because this case seeks review of a state supreme court decision, not a federal court of appeals decision, § 1254(1) is inapplicable.

28 U.S.C. § 1257, which provides jurisdiction to review certain state-court decisions, likewise does not confer jurisdiction here. Section 1257 limits this Court's review of state-court decisions to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). Here, the New Hampshire Supreme Court's decision reversed the grant of summary judgment in Dan's City's favor and remanded the case. Pet. App. 2. Thus, the decision below is not a "final judgment" within the meaning of § 1257. *See Market St. Ry. Co. v. R.R. Comm'n of Cal.*, 324 U.S. 548, 551 (1945) (explaining that, to be final, the state court judgment must be "an effective determination of the litigation").

This Court has identified four narrow categories of cases in which it has treated a state-court decision as a final judgment on the federal issue even though additional state-court proceedings are anticipated. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). This case fits within none of those categories. The first two categories cover cases in which (1) "the federal issue is conclusive or the outcome of further proceedings preordained," or (2) the federal issue "will survive and require decision regardless of the outcome of future

state-court proceedings." *Id.* at 479-80. These categories do not apply here because the outcome of this case is not preordained—either party may prevail on remand—and if Petitioner prevails on remand, the question presented will no longer require decision. Thus, "[t]he outcome of those further proceedings could moot the federal question" presented here. *Jefferson City v. Tarrrant*, 522 U.S. 75, 77 (1997). The third category, which covers cases in which "'later review of the federal issue cannot be had, whatever the ultimate outcome of the case,'" likewise does not apply because, if Petitioner does not prevail on remand, it "will be free to seek [Supreme Court] review once the state-court litigation comes to an end." *Id.* at 82-83 (quoting *Cox*, 420 U.S. at 481).

Nor does the fourth category confer jurisdiction over this case. That category applies where "the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds," "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action," and "refusal immediately to review the state court decision might seriously erode federal policy." *Cox*, 420 U.S. at 482-83. Here, refusal immediately to review the New Hampshire court's decision presents no risk of "seriously erod[ing] federal policy." *Id.* at 483. There is no federal statutory scheme regulating the disposal of towed vehicles to collect a debt. And this case is not one in which "the proper forum for trying the issue . . . depends on the resolution of the federal question." *Belknap, Inc. v. Hale*, 463 U.S. 491, 497 n.5 (1983) (citation omitted).

Moreover, as the New Hampshire Supreme Court explained, allowing Mr. Pelkey's claims "to proceed against the defendant does not 'significantly impact' Congress's

deregulatory objectives." Pet. App. 15. In enacting § 14501(c)(1), Congress was concerned with "[s]tate economic regulation of motor carrier operations," such as "entry controls, tariff filing and price regulation, and types of commodities carried," and sought to level the playing field between motor and air carriers. H.R. Conf. Rep. No. 103-677, pp. 86- 87 (1994), *reprinted in* 1994 U.S. Code Cong. & Admin. News 1715, 1758-59. As the court below noted, however, "the manner in which a company in possession of a towed vehicle may dispose of the vehicle to collect on a debt created by operation of state law" is "far removed from Congress's aim of promoting free markets and equalizing the competitive playing field between motor carriers and air carriers." Pet App. 15; *cf. Joe Nagy Towing, Inc. v Lawless*, __ So. 3d __, 2012 WL 4839853, *7 (Fla. App. Oct. 12, 2012) (not yet released for publication) ("[T]he Conference Report leaves little doubt that the purpose of the Amendment was to facilitate uniform economic regulations for organizations providing interstate and intrastate transportation services by air or ground. Nothing in the detailed Report suggests that Congress intended to preempt or in any way affect civil conversion claims.").

In short, because this case does not fall within any of the four categories identified in *Cox*, the Court lacks jurisdiction to review the decision below.

II. The Issues In This Case Do Not Merit Review.

Relying on a single other state supreme court case, *Weatherspoon v. Tillery Body Shop, Inc.*, 44 So. 3d 447 (Ala. 2010), and one unpublished court of appeals case, *Ware v. Tow Pro Custom Towing & Hauling, Inc.*, 289 Fed. Appx. 852 (6th Cir. 2008), Petitioner's primary argument for certiorari is that review is necessary to

resolve a split between the state supreme courts and a court of appeals. But Petitioners' claim of a split is overblown, the cases on which it relies do not grapple with differences between claims based on vehicle storage and claims based on vehicle disposal, and the paucity of authority on which it relies demonstrates that the issues here are not ones that arise often enough to require this Court's attention.

To begin with, although Petitioner claims a split with the Sixth Circuit, the single court of appeals decision on which it relies for the split, *Ware*, is unpublished and therefore has no precedential value in that circuit. *See Crump v. Lafler*, 657 F.3d 393, 405 (6th Cir. 2011) ("Unpublished decisions in the Sixth Circuit are, of course, not binding precedent on subsequent panels[.]"). At best, therefore, petitioner has claimed a split between two state supreme court cases on an issue that the other 48 state supreme courts have yet to consider and that no court of appeals has addressed in a precedential manner.

Moreover, although Petitioner claims (Pet. 8) that this case presents a "fact pattern almost identical" to those in *Weatherspoon* and *Ware*, the facts and claims in those cases differ meaningfully from those here. For example, in neither of those cases did the towing company falsely tell the vehicle owner that it had sold the car at auction when it had not in fact done so. Indeed, unlike here, where Mr. Pelkey's attorney specifically informed Petitioner that the car was not abandoned, in *Weatherspoon*, the towing company and vehicle owner had no contact before the vehicle was sold. *See Weatherspoon*, 44 So. 3d. at 448-49; *Joe Nagy Towing*, 2012 WL 4839853, at *8 (distinguishing *Weatherspoon* from case in which vehicle owner repeatedly sought return of his car because "*Weatherspoon* involved no allegations that the appellant vehicle owner

communicated in any way with the towing company"). Because whether a state law is sufficiently related to motor carrier prices, routes, and services to be preempted depends on the nature of the claims being asserted, differences in facts and claims can alter the preemption inquiry.

Further, neither case on which Petitioner relies grapples with differences between claims related to *storage* of a vehicle and claims related to a company's *disposal* of a vehicle to collect a debt secured by a lien. In *Ware*, the only claim the court considered that was related at all to a vehicle's disposal was a claim that a tow company "converted the [plaintiffs'] truck by failing to provide the Wares sufficient notice of the storage fees and sale." 289 Fed. Appx. at 856. In discussing that claim, the court focused on storage fees, rather than on the sale. The court noted that the plaintiffs argued that various state statutes required written authorization for storage, prohibited collection of storage fees for over 60 days, and prohibited collection of storage fees unless certain circumstances were met. It then stated that the claim was preempted, without analyzing the sale element of the claim separately from the elements related to storage fees. *Id.* Moreover, the Sixth Circuit never addressed the applicability of § 14501(c)(2)(C), the exception to the preemption provision in § 14501(c)(1), because the plaintiffs had not raised it below. 289 Fed. Appx. at 857.

In *Weatherspoon*, the plaintiff alleged numerous causes of action against the company that towed and sold her car, including negligence and wantonness, deprivation of possession of the vehicle, recovery of chattel in specie, conversion, negligent and wanton supervision, and fraudulent suppression. In considering preemption, the court devoted significantly more space to discussing the

constitutionality of § 14501(c)(1) and whether it preempted private state-law claims related to motor carrier rates, routes, and services in general than to considering whether the specific claims before it were preempted. The court discussed preemption of the particular claims alleged in only one paragraph and did not note that the claims related to a debt secured by a lien.

Thus, the issues in this case have barely been considered by the lower courts. The vast majority of lower courts have not addressed whether § 14501(c)(1) preempts claims based on disposal of a vehicle to collect a debt secured by a lien, and the two cases on which Petitioner relies for a split have not fully analyzed differences between claims based on towing and/or storage of a vehicle and claims based on disposal of the vehicle. Any review of the issues in this case would benefit from giving the state supreme courts and federal courts of appeals further opportunity to consider them.

III. The New Hampshire Supreme Court Correctly Held That Mr. Pelkey's Claims Are Not Preempted.

The New Hampshire Supreme Court correctly held that § 14501(c)(1) does not preempt Mr. Pelkey's claims. As the court held, the claims in this case neither relate to motor carrier prices, routes, or services nor are "with respect to the transportation of property." Mr. Pelkey has not challenged Dan's City's ability to tow the vehicle, the fees charged for the towing, or even the fees charged for storage. Rather, his claims are based on Dan's City's deceptive acts and violation of state-law duties in the process of disposing of his car. Dan's City's acts in disposing of Mr. Pelkey's vehicle against his wishes were not services the company provided to Mr. Pelkey or

anyone else, let alone services with respect to the transportation of property. And Mr. Pelkey's claims have no more than a "tenuous, remote, or peripheral" effect on the services that Dan's City does provide. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 390 (1992) (citation omitted).

Moreover, if Mr. Pelkey's claims concerning the disposal of his vehicle were sufficiently related to Dan's City's towing services to be preempted, they would also be sufficiently related to the price of those services, because holding an auction and trading the car were the means through which Dan's City sought payment for the "price" it charged. Claims related to the price of non-consensual towing, however, are exempt from preemption under 49 U.S.C. § 14501(c)(2)(C), which provides an exception to preemption under § 14501(c)(1) for state laws "relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle." Thus, even if the state laws at issue here were sufficiently related to prices, routes, and services to be preempted under § 14501(c)(1), they would be saved from preemption by § 14501(c)(2)(C). *See Independent Towers of Wash. v. Washington*, 350 F.3d 925, 932 (9th Cir. 2003) (holding it unnecessary to determine whether regulation of acceptable methods of payment for non-consensual towing was related to price because, if it were, it would be saved from preemption by § 14501(c)(2)).

The lower court's conclusion that § 14501(c)(1) does not preempt state laws governing the manner in which a towing company disposes of a vehicle to collect a debt is particularly appropriate here because the only reason Dan's City would have had authority to sell Mr. Pelkey's vehicle—a piece of property belonging to someone else

that it had taken without that person's knowledge or consent—is that state regulation authorizes such sales in certain circumstances. As the New Hampshire Supreme Court noted, "the defendant has sought the benefit of state law allowing it to claim a lien on a vehicle in its possession, . . . but now seeks to avoid the inconvenience of providing adequate notice and conducting an auction as required by state law." Pet. App. 17. If § 14501(c)(1) preempts all state laws related to towing companies' sale of vehicles to collect towing and storage fees, then it preempts not only the requirements for conducting an auction and disposing of a vehicle, but also the state-law authority for towing companies to conduct auctions and dispose of vehicles in the first place.[1]

Further, if claims related to selling or otherwise disposing of a towed car were preempted, then, no matter what state law provided about how long a vehicle must be kept before it could be sold, towing companies could tow cars directly from parking lots to auction lots and sell the cars immediately, without providing any compensation to the owners of the vehicles, and the owners would have no remedy against the towing companies for their losses. Such a result cannot be what Congress intended in § 14501(c)(1). *See Joe Nagy Towing*, 2012 WL 4839853, at *7 (in case in which vehicle owner repeatedly sought return of car before it was sold, noting that if claims like the

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[1]Petitioner notes that states can take "precautionary measures" to address "situations where a vehicle owner who truly has not abandoned it fails to claim the vehicle in a timely manner," Pet. 14, thereby recognizing that § 14501(c)(1) does not preempt all state or local laws related to towed vehicles and owners' attempts to retrieve them. Petitioner does not explain how the state laws that it asserts are preempted differ from the measures that it agrees states can take.

vehicle owner's were preempted by § 14501(c)(1) "then towing companies (and other 'motor carriers,' for that matter) around the country could convert others' property with impunity").

Indeed, that Congress did not intend § 14501(c)(1) to preempt state laws such as those at issue here is demonstrated by the Conference Report on the Federal Aviation Administration Authorization Act of 1994 (FAAAA), which included § 14501(c)(1). The Conference Report listed nine states that, it stated, did not regulate "intrastate prices, routes and services of motor carriers." H.R. Conf. Rep. No. 103-677, p. 86. At the time of the FAAAA, however, most of the listed states regulated disposal of towed vehicles. Thus, the Report shows that Congress did not consider such regulation to be regulation of a motor carrier "price, route, or service." The court below correctly held that Mr. Pelkey's claims are not preempted, and those claims should be allowed to proceed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 2012

REPLY BRIEF

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AND
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No. 12-52

In The
Supreme Court of the United States

DAN'S CITY USED CARS, INC. D/B/A DAN'S CITY AUTO BODY,

Petitioner,

v.

ROBERT PELKEY,

Respondent.

On Petition For A Writ of Certiorari To The Supreme Court of New Hampshire

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Respondent's arguments opposing certiorari misconstrue both Petitioner's arguments as well as the applicable law. Respondent also glosses over the clear split of authority between the Alabama Supreme Court and the New Hampshire Supreme Court on the question of whether 49 U.S.C. § 14501(c)(1) preempts state law claims against towing companies that dispose of towed vehicles because of unpaid towing and storage fees. *See Weatherspoon v. Tillery Body Shop, Inc.*, 44 So.3d 447 (Ala. 2010); *Robert Pelkey v. Dan s City Used Cars, Inc. d/b/a Dan s City Auto Body*, 163 N.H. 483 (2012). Given that these two courts analyzed the same federal statute, and interpreted the same decisions of this Court in reaching their opposite conclusions, the issue of the preemptive effect of 49 U.S.C. § 14501(c)(1) in cases such as this one is ripe for review. This Court has jurisdiction to hear this matter, and it should determine now whether federal law preempts state common law and statutory damage claims arising out of the towing, storage, and disposal of vehicles towed without their owners' consent, so that state and federal courts around the country have clear guidance on this important issue.

REASON FOR GRANTING THE WRIT

THE COURT HAS JURISIDICTION TO HEAR THIS CASE AND THE EFFECT OF THE NOW UNSETTLED LAW ON THE TOW TRUCKING INDUSTRY MERITS THIS COURT'S ATTENTION.

I. The New Hampshire Supreme Court's Decision in *Pelkey* Is An Appealable Final Judgment.

The *Pelkey* decision is a final decision within the meaning of 28 U.S.C. §1257. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 485 (1975). As in *Cox*, the New Hampshire Supreme Court's decision is final on the issue of preemption, and that federal issue is not subject to further review in the state courts. *See id.* In addition, as in *Cox*, Petitioner here will be liable for damages if the elements of the state cause of action are proved, and will be put to the unfair cost and expense of defending an action that is barred by federal law if the New Hampshire Supreme Court's ruling on preemption is erroneous. *See id.* In both *Cox* and other cases, this Court has permitted review in these circumstances to avoid the mischief of economic waste and of delayed justice. *See id. See also Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945).

Moreover, even if Petitioner prevailed at trial and made further consideration of the federal preemption question unnecessary, the clear conflict

between the Alabama Supreme Court and the New Hampshire Supreme Court would remain unreviewed, leaving an important question of federal law unresolved. *See Cox*, 420 U.S. at 485. This would undermine the important federal policy embodied in 49 U.S.C. § 14501(c)(1), and also leave unanswered a question which is of practical and daily importance to the tens of thousands of tow truck operators in this country.

This Court has already recognized that the general issue of state and local regulation of motor carriers is worthy of its attention. *See Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364, 369 (2008); *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424 (2002). In order to give prompt justice in the instant case, and ensure clarity on an important federal preemption issue so that the tow trucking industry is not left in limbo, this Court should follow the pragmatic approach it has followed in the past in determining finality, *see Cox*, 420 U.S. at 486, and conclude it has jurisdiction to hear this matter.

II. The Issues In This Case Merit Review Because They Have Generated Conflicting Decisions In Multiple Cases Where A Vehicle Owner Sues A Towing Company Which Disposes Of A Vehicle To Recoup Unpaid Towing And Storage Charges.

Respondent's arguments against certiorari are based upon immaterial factual distinctions between this case and the *Weatherspoon* and *Ware* cases,

where the latter courts reached a contrary conclusion to that of the New Hampshire Supreme Court on the preemption issue. *Weatherspoon*, 44 So. 3d at 447; *Ware v. Tow Pro Custom Towing & Hauling, Inc.*, 289 F. App'x, 852 (6th Cir. 2008) (not selected for publication); *Pelkey*, 163 N.H. at 483. All of these cases involve claims by vehicle owners seeking damages against a towing company after a towed vehicle has been stored, towing and storage fees are not paid, and the towing company disposes of the vehicle to cover the bill for unpaid fees.[1]

Respondent's contention that claims arising out of wrongful disposal of a vehicle are somehow not related to a towing company's services ignores the reality that disposal only occurs because fees for the services, including both towing and storage services, are unpaid. There is a clear relationship between the disposal of a towed vehicle and the towing company's transportation services, as disposal is nothing but a

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[1] Petitioner notes for the record, however, that Respondent's portrayal of the facts of this case is somewhat misleading. It is undisputed that Respondent and his counsel knew that Mr. Pelkey's vehicle had not been sold to a third-party at auction in sufficient time for Mr. Pelkey to reclaim his vehicle. Mr. Pelkey, however, apparently did not want to pay any storage fees at all, and instead, on May 25, 2007, through his counsel proposed that Petitioner waive all storage charges that had accumulated since February 3, 2007. N.H.S.Ct. Def.'s App. 86-87. Further, the letter which Petitioner sent to Respondent about his vehicle was not simply returned to Petitioner. The letter was returned by the Post Office, which indicated Mr. Pelkey had moved and left no address. *Id.* at 5-6.

means for obtaining payment for services rendered. Thus, while the specific facts of claims against towing companies for wrongful disposal of a towed vehicle will always vary somewhat, the preemption analysis related to nonconsensual tows remains the same, i.e., whether the actions of the tow truck operator are "related" to a towing truck's service, and whether these actions are encompassed within the statutory definition of "transportation."

This pattern of cases is likely to continue to repeat itself, as disposal of towed vehicles is the only means for a tow truck operator to recover unpaid fees for towing and storage charges where the vehicle owner, for whatever reason, fails to claim the vehicle. Whether these state law actions brought by vehicle owners against towing companies over alleged wrongful dispositions of vehicles are preempted by federal law should therefore be resolved by this Court now. The fact that Respondent is critical of the depth of analysis in the *Weatherspoon* and *Ware* decisions does not mean that the Court needs to wait until more courts have weighed in before deciding this issue. The resolution of the preemption issue rests primarily on how criteria already identified by this Court are applied to this general fact pattern.

III. The Disagreement Between the New Hampshire Supreme Court and Other Courts About Whether The Absence Of A Federal Remedy For Aggrieved Vehicle Owners Should Affect A Preemption Decision Is An Additional Reason For The Court To Decide This Appeal.

The New Hampshire Supreme Court explicitly rejected the Alabama Supreme Court's conclusion that "the failure of Congress to provide an alternative remedy upon preemption is [no] basis for finding that [the plaintiff's] claims are not preempted." *Pelkey*, 163 N.H. at 496. The state courts are clearly in a state of confusion as to when the absence of a remedy permits a court to bar preemption. The Court should address this confusion by clarifying whether the absence of a federal remedy against a tow truck operator is a bar to preemption of claims that are within the scope of § 14501(c)(1).

IV. The Price Exception Will Not Save Respondent's Claims.

Respondent suggests that the "price" exception to preemption, as set forth in § 14501(c)(2)(C), would save his claims even if this Court determined that Respondent's claims were otherwise preempted.[2]

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[2] Respondent acknowledges that this issue was not ruled upon by the New Hampshire Supreme Court, nor has Respondent filed a cross-petition for a writ of certiorari related to same.

Respondent's claim that this "price" exception would save his case, however, ignores the legislative history of § 14501(c). § 14501(c)(2)(C) is clearly intended to exempt only the actual prices charged for nonconsensual towing services from preemption, and is not intended to allow states and municipalities to regulate other aspects of the towing industry. *See R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F. 3d 538, 544 (11th Cir. Ga. 1998), disapproved in part on other grounds in *Ours Garage & Wrecker Service, Inc.*, 536 U.S. at 424 (citing extensively to the legislative history related to this amendment). *See also Harris County Wrecker Owners for Equal Opportunity v. City of Houston*, 943 F. Supp. 711, 723 (S.D. Tex. 1996) (discussing the rejection of the Senate's proposed amendment).

CONCLUSION

The Court should grant the Petition for a writ of certiorari and reverse the decision of the Supreme Court of New Hampshire.

Respectfully submitted,

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JOINT APPENDIX

Supreme Court, U.S.
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No. 12-52

IN THE

Supreme Court of the United States

DAN'S CITY USED CARS, INC. D/B/A
DAN'S CITY AUTO BODY,
Petitioner,

v.

ROBERT PELKEY,
Respondent.

On Writ of Certiorari To The
Supreme Court of New Hampshire

JOINT APPENDIX

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Certiorari Granted: December 7, 2012

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State of New Hampshire
Hillsborough County Superior Court
Northern District
Docket No. 09-C-241

Robert Pelkey v. Dan's City Used Cars, Inc. d/b/a Dan's City Auto Body and Colonial Village, Inc.

Date Filed: 4/28/2009

[List of parties and counsel omitted in printing]

Date Filed	#	Docket Text
4/28/2009	1	WRIT OF SUMMONS (Brian C. Shaughnessy, Esq.)
		* * * * *
5/8/2009	4	SPECIAL APPEARANCE for Defendant Dan's City Used Cars, Inc. d/b/a Dan's City Auto Body (Kate Strickland)
		* * * * *
5/29/2009	9	SPECIAL PLEA AND BRIEF STATEMENT by Defendant Dan's City Used Cars, Inc. d/b/a Dan's City Auto Body
		* * * * *
2/9/2010	39	ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT by Defendant Colonial Village, Inc.
		* * * * *

Date Filed	#	Docket Text
5/24/2010	47	MOTION FOR PARTIAL SUMMARY JUDGMENT WITH RESPECT TO PLAINTIFF'S CONSUMER PROTECTION ACT CLAIM (COUNT I) by Defendant Dan's City Used Cars, Inc. d/b/a Dan's City Auto Body
		* * * * *
6/22/2010	49	OBJECTION TO MOTION FOR PARTIAL SUMMARY JUDGMENT WITH RESPECT TO PLAINTIFF'S CONSUMER PROTECTION ACT CLAIM (COUNT I) (#47) filed by Plaintiff
6/25/2010	50	MOTION TO DISMISS FOR LACK OF JURISDICTION by Defendant Dan's City Used Cars, Inc. d/b/a Dan's City Auto Body
7/9/2010	51	REPLY TO PLAINTIFF'S OBJECTION TO DEFENDANT DAN'S CITY USED CARS, INC. D/B/A DAN'S CITY AUTO BODY'S MOTION FOR PARTIAL SUMMARY JUDGMENT WITH RESPECT TO PLAINTIFF'S CONSUMER PROTECTION ACT CLAIM (COUNT I) by Defendant Dan's City Used Cars, Inc. d/b/a Dan's City Auto Body

Date Filed	#	Docket Text
7/23/2010	61	OBJECTION TO MOTION TO DISMISS FOR LACK OF JURISDICTION (#50) by Plaintiff
		* * * * *
7/26/2010	65	REPLY TO PLAINTIFF'S OBJECTION TO MOTION TO DISMISS FOR LACK OF JURISDICTION (#61) by Defendant Dan's City Used Cars, Inc. d/b/a Dan's City Auto Body
		* * * * *
12/17/2010	76	ORDER OF THE COURT ON MOTIONS FOR SUMMARY JUDGMENT AND MOTION TO DISMISS (No. 42, 47 and 50)
12/27/2010	77	MOTION FOR RECONSIDERATION OF ORDER OF THE COURT ON MOTIONS FOR SUMMARY JUDGMENT AND MOTION TO DISMISS (#76) by Plaintiff
1/6/2011	78	OBJECTION TO MOTION FOR RECONSIDERATION OF ORDER OF THE COURT ON MOTIONS FOR SUMMARY JUDGMENT AND MOTION TO DISMISS (#77) by Defendant Dan's City Used Cars, Inc. d/b/a Dan's City Auto Body

Date Filed	#	Docket Text
3/3/2011	79	NOTICE OF APPEAL Re: Dan's City Used Cars, Inc. d/b/a Dan's City Auto Body by Plaintiff
		* * * * *
9/26/2012	83	NEW HAMPSHIRE SUPREME COURT OPINION – REVERSED – REMANDED

New Hampshire Supreme Court
Docket No. 2011-0144

Robert Pelkey v. Dan's City Used Cars, Inc. d/b/a Dan's City Auto Body and Colonial Village, Inc.

Date Filed: 3/2/2011

Date Terminated: 4/10/2012

[List of parties and counsel omitted in printing]

Date Filed	Docket Text
3/2/2011	NOTICE OF APPEAL filed by Brian C. Shaughnessy
3/23/2011	ACCEPTANCE ORDER; NOTICE RE: MEDIATION
8/23/2011	BRIEF filed by Plaintiff. 15 minute oral argument requested. Brian Shaughnessy will argue. (Brian C. Shaughnessy)
10/6/2011	BRIEF AND APPENDIX of Dan's City Used Cars, Inc. (Kate Strickland). Atty Strickland requests 15 min. oral argument.
2/9/2012	Oral argument (Lynn, J did not sit but will participate by listening to the CD)
4/10/2012	Reversed and remanded (Lynn, J.)

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS: NORTHERN DISTRICT **SUPERIOR COURT DOCKET #_____**

Robert Pelkey

v.

Dan's City Used Cars, Inc. d/b/a Dan's City Auto Body and Colonial Village, Inc.

WRIT OF SUMMONS

PARTIES

1. Robert Pelkey is an individual with an address of 25 Brook Street, Apt. A1, Manchester, New Hampshire.

2. Colonial Village, Inc. is a Massachusetts Corporation licensed to do business in the State of New Hampshire with a principal address of P.O. Box 1167, Salem, New Hampshire 03079 (hereinafter "Colonial Village").

3. Dan's City Used Cars, Inc. d/b/a Dan's City Auto Body is a New Hampshire Corporation with a principal address of 272 Sheffield Road, Manchester, New Hampshire (hereinafter "Dan's City").

FACTS

4. At the times relevant to this lawsuit Robert Pelkey had been a tenant of Defendant Colonial Village. Robert Pelkey moved into his apartment in the Colonial Village apartment complex in April, 2002.

5. Mr. Pelkey's 2004 Honda Civic automobile was towed from the parking lot of Colonial Village by co-Defendant Dan's City. At the time Mr. Pelkey's automobile was towed, it was parked in a designated handicap parking spot, displayed a valid and current handicap license plate, was properly registered, fully operational, and displayed a current parking sticker issued by Colonial Village. For approximately two years prior to Mr. Pelkey's being towed from the Colonial Village parking lot, Mr. Pelkey suffered from serious medical conditions that required him to be hospitalized for extended periods of time. From February 9, 2005 through May 19, 2006 Mr. Pelkey was away from his apartment at Colonial Village due to hospitalization and then in-patient convalescence care at a nursing home. Following his discharge from the nursing home/convalescence care, Mr. Pelkey continued to have significant health problems which lead to his admission at the Catholic Medical Center on February 12, 2007 for the amputation of his left foot due to severe complications of his diabetes.

6. Colonial Village was aware of Mr. Pelkey's health condition and his lengthy absence from the apartment unit due to his life-threatening illnesses. While Mr. Pelkey faithfully paid his

monthly rent to Colonial Village while he was absent from the apartment, Colonial Village started several eviction actions in the Manchester District Court in an attempt to evict Mr. Pelkey for breach of the lease agreement and other good cause. One of these lawsuits was dismissed by the Manchester District Court specifically because Colonial Village could not establish proper service of process because the apartment may not qualify as Mr. Pelkey's abode at a time when Mr. Pelkey was in a nursing home and it was unclear whether he would ever leave the nursing home. This issue was raised in several of the eviction hearings and was the subject of an order of the Manchester District Court dated March 31, 2006. Accordingly, Colonial Village had actual knowledge of not only Mr. Pelkey's medical condition, but of circumstances which would result in Mr. Pelkey not being present in the apartment for periods of time when he was admitted to medical facilities due to his medical condition.

7. Colonial Village established a parking policy which requires tenants to move the tenant's vehicles to accommodate snow removal from the parking lot during and after a snow event. This policy provides that if the tenant does not move the tenant's automobile consistent with the terms of the parking policy, that the tenant's vehicle may be towed at the owner's expense. In addition, the Colonial Village parking lots are posted with signs that indicate that unauthorized vehicles will be towed at the owner's expense.

8. Due to Mr. Pelkey's medical condition and limited mobility, occasionally he would require

assistance in moving his automobile in order to comply with the Colonial Village parking policy with respect to snow events. If Mr. Pelkey was having medical difficulties when a snow event occurred, he would call the office to verify whether plowing would occur and if he received a positive response, he would coordinate with either the office, or another tenant in the building, in order to have his vehicle moved to allow for proper snow removal.

9. On the date Mr. Pelkey's vehicle was towed from the Colonial Village Parking lot by Dan's City, Saturday February 3, 2007, Mr. Pelkey was home in his apartment unit at Colonial Village and was experiencing medical difficulties which would make it impossible for him to personally move his automobile from the parking lot. However, Mr. Pelkey did not believe the snow event was of sufficient quantity that plowing of the parking lot may be necessary. Mr. Pelkey attempted to contact the Colonial Village office, to verify whether plowing would occur but received the answering service because the office was closed. He did not make arrangements for his vehicle to be moved by any other tenant because he was unable to verify whether plowing would occur.

10. On February 3, 2007 Mr. Pelkey's vehicle was towed from the Colonial Village parking lot without his knowledge. At the time the vehicle was towed, Mr. Pelkey was suffering from a serious medical condition and was essentially bedridden. Approximately one week later, Mr. Pelkey was admitted into the Catholic Medical Center for a procedure to amputate his left foot. During this

admission, Mr. Pelkey also suffered a heart attack and he was not discharged from the Catholic Medical Center until April 9, 2007.

11. Mr. Pelkey is a single individual with no children, and no living relatives other than two sisters who reside out of state. After being discharged from the Catholic Medical Center on April 9, 2007, the first visitor to Mr. Pelkey's home was his legal counsel, Attorney Brian Shaughnessy, at that time, Attorney Shaughnessy discovered that Mr. Pelkey's vehicle was not parked in the handicap parking space at the rear of his building and an inquiry was made to the Colonial Village office as to whether Mr. Pelkey's vehicle was moved to an overflow parking area.

12. On or about April 17, 2007, Mr. Pelkey's legal counsel was advised by legal counsel for Colonial Village that the vehicle had been towed by Dan's City and was scheduled to be sold at a public auction on April 19, 2007. Counsel for Mr. Pelkey faxed a letter to Dan's City on April 17, 2007. The letter specifically advised that Mr. Pelkey had been hospitalized for several months due to an operation to amputate his left foot and a heart attack, and further advised that Mr. Pelkey has not abandoned his automobile and wants to arrange for the return of the vehicle as expeditiously as possible.

13. Despite being notified that the vehicle was not abandoned and that the owner wanted to make arrangements for the return of the automobile, Dan's City sold the vehicle at public auction on April 19, 2007. The contents of the vehicle, including

eyeglasses, computer software, and numerous tools, were never returned to Mr. Pelkey. Despite several requests for an accounting of the sale proceeds, Dan's City has not supplied any accounting to Mr. Pelkey.

14. Prior to selling Mr. Pelkey's automobile at public auction on April 19, 2007, Dan's City filed a form entitled "Notice to the Director of Removal" with the New Hampshire Department of Safety requesting permission to sell the vehicle at auction, without notice. Dan's City made representations that the vehicle was abandoned, and that the owner of the vehicle was unknown. The notice further represents that the current market value of the vehicle was under $500 and the vehicle was not in condition for legal public way use.

15. At that time that Dan's City was filing the "Notice to the Director of Removal" on March 12, 2007, Mr. Pelkey's 2004 Honda Civic had under 8,000 miles, was meticulously maintained, was registered, inspected, fully operational, and had a blue book value of approximately $12,000. With respect to the identity of the owner, the vehicle had a parking sticker issued by Colonial Village which would identify the owner, there was a current license plate on the vehicle which would identify the owner, there was a registration inside the vehicle which would clearly identify the owner and the owners address, and a simple telephone call to the Colonial Village management office would have clearly identified the owner to Dan's City.

16. On June 5, 2007, counsel for Mr. Pelkey forwarded a detailed letter to Dan's City and

Colonial Village detailing the factual circumstances known at that time, indicating that to the extent that Colonial Village or Dan's City Auto Body could rely on RSA 262, Dan's City failed to comply with that statute, and demanded that Mr. Pelkey be compensated for the value of his vehicle. This demand letter further indicated that should a resolution of this matter not be reached, claims would be pursued under the Consumer Protection Act and RSA 540-A at which time triple damages and attorneys' fees and costs would be demanded. There has been no response to the June 5, 2007 letter and Mr. Pelkey still has not received an accounting of the proceeds received at auction.

17. Dan's City is an agent of Colonial Village for all purposes relevant to this litigation.

COUNT I – CONSUMER PROTECTION ACT – DAN'S CITY

18. All of the facts in Paragraphs 1-17 are incorporated herein by reference.

19. Dan's City has engaged in deceptive acts in the conduct of its business by making false statements regarding the value of Mr. Pelkey's vehicle, the condition of Mr. Pelkey's vehicle, the fact that the vehicle had been abandoned, about whether any inquiry was made to identify the owner of the vehicle, by failing to follow the procedures set forth in RSA 262, and by failing to cancel a scheduled public auction when the identity of the owner and the circumstances of the delay in recovering the vehicle were made known to Dan's City.

20. As a result of the deceptive acts of Dan's City, Mr. Pelkey was deprived of his automobile which had a value of approximately $12,000.00, along with personal property that was in the vehicle which had a value of approximately $500.00.

21. The deceptive acts of Dan's City were knowing and willful violations of the Consumer Protection Act.

22. Mr. Pelkey has incurred attorneys' fees and costs in connection with attempting to recover his vehicle and in proceeding with this legal action.

23. Mr. Pelkey seeks an award of 37,500.00, plus attorneys' fees and costs.

COUNT II - NEGLIGENCE – DAN'S CITY

24. All of the facts in Paragraphs 1-17 are incorporated herein by reference.

25. Dan's City had a statutory duty under RSA 262, as well as a common law duty as a bailor, to use reasonable care to ascertain the identity of the owner of the 2004 Honda Civil it towed from the parking lot at Colonial Village and to use reasonable care in disposing of the automobile. Dan's City owed a duty to Mr. Pelkey to make reasonable efforts to return the vehicle to Mr. Pelkey.

26. Dan's City breached both statutory and common law duties owed to Mr. Pelkey and towed the vehicle from the Colonial Village parking lot, and

sold the vehicle at public auction without accounting to Mr. Pelkey in any way.

27. As a result of the breach of duties owed by the Defendant to the Plaintiff, the Plaintiff has suffered damages by being deprived of the value of his automobile.

COUNT III – CONSUMER PROTECTION ACT – COLONIAL VILLAGE

28. All of the allegations contained in Paragraphs 1-17 are repeated and incorporated herein by reference.

29. Colonial Village is responsible for the acts of its agent, Dan's City.

30. Colonial Village has engaged in an unfair or deceptive act or practice by instituting a parking policy that allows for a tenant's vehicle to be towed from a parking lot without incorporating into that policy procedures for notification to the tenant.

31. The Plaintiff has been harmed by the unfair or deceptive practice or act of having his vehicle towed from the Colonial Village parking lot and the failure to follow any reasonable procedures to notify the Plaintiff that his vehicle has been removed and will be sold at public auction. Colonial Village's violations of the Consumer Protection Act are knowing and willful and the Plaintiff should be awarded triple damages and attorneys' fees and costs.

COUNT IV – BREACH OF CONTRACT – COLONIAL VILLAGE

32. All of the allegations contained in Paragraphs 1-17 are repeated and incorporated by reference.

33. Robert Pelkey had a Lease Agreement with Colonial Village which provided Mr. Pelkey the contractual right to park his automobile in the Colonial Village parking lot.

34. Colonial Village breached the contract between the parties by allowing Mr. Pelkey's automobile to be towed from the parking lot. After being notified by legal counsel for Mr. Pelkey that the vehicle had been towed from the lot, and with knowledge that the vehicle was to be sold at auction, Colonial Village failed to contact its agent, Dan's City, and make arrangements for the return of Mr. Pelkey's vehicle.

35. The Plaintiff sustained damage as a result of Colonial Village's breach of the contract in an amount within the jurisdictional limits of this Court.

COUNT V - RSA 540-A - COLONIAL VILLAGE AND DAN'S CITY

36. All of the allegations contained in Paragraphs 1-17 are repeated and incorporated by reference.

37. RSA 540-A:3, III sates that "[n]o landlord shall willfully seize, hold, or otherwise directly or indirectly deny a tenant access to and possession of such tenant's property, other than by proper judicial process." The definition of landlord includes an agent of the owner.

38. Colonial Village and Dan's City violated RSA 540-A:3, III by towing Mr. Pelkey's vehicle from the Colonial Village parking lot and then refusing to return the vehicle even after being notified by legal counsel for Mr. Pelkey that the vehicle was not abandoned and further described the health circumstances which prohibited Mr. Pelkey from realizing the vehicle had been towed from its lawful handicap parking spot.

39. The Plaintiff is entitled to an award of damages for the violation of RSA 540-A:3, III including an award of attorneys' fees and costs.

COUNT VI – FAIR HOUSING ACT VIOLATION - COLONIAL VILLAGE AND DAN'S CITY

40. All of the allegations contained in Paragraphs 1-17 are repeated and incorporated by reference.

41. The Plaintiff qualifies as a person with a handicap due to a physical impairment which substantially limits one or more major life activities within the meaning of the Federal Fair Housing Act 42. U.S.C. § 3602.

42. The Defendants violated the Fair Housing Act by failing to provide a reasonable accommodation to the Plaintiff as required by the Fair Housing Act. The Defendants were aware that the Plaintiff was a person with a handicap who could not comply with the parking regulations due to the Plaintiff's disability. The Defendants failed to modify their policies and procedures thereby depriving the Plaintiff the equal opportunity to use and enjoy housing.

43. Pursuant to 42 U.S.C. § 3613, the Plaintiff seeks an award of compensatory and punitive damages, and an award of attorneys' fees and costs against both Defendants for the violation of the Fair Housing Act.

WHEREFORE, the Plaintiff requests the following relief:

A. That judgment be entered for the Plaintiff and an award of damages and attorneys' fees and costs be awarded to Plaintiff on each of the Counts contained in this Writ.

Respectfully submitted,

Robert Pelkey, Plaintiff

By and Through his Attorneys,

KAZAN, SHAUGHNESSY, KASTEN & MCDONALD, PLLC

Dated: March 27, 2009 By: _____

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PETITIONER'S BRIEF

RECORD
AND
BRIEFS

No. 12-52

Supreme Court, U.S.
FILED
JAN 22 2013
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IN THE
Supreme Court of the United States

DAN'S CITY USED CARS, INC. D/B/A
DAN'S CITY AUTO BODY,
Petitioner,

v.

ROBERT PELKEY,
Respondent.

On Writ of Certiorari To The
Supreme Court of New Hampshire

PETITIONER'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

The Federal Aviation Authorization Act of 1994 ("FAAAA") provides, with certain exceptions inapplicable here, that "a State . . . may not enact or enforce a law . . . related to a price, route or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). Tow trucks are motor carriers within the meaning of § 14501(c)(1). *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 430 (2002). In this case, a vehicle owner whose car was towed from his apartment house's parking lot without his knowledge or consent to allow for snow removal, and disposed of several months later by the towing company after towing and storage charges were not paid, sued the towing company in state court for damages, alleging negligence and consumer fraud. The New Hampshire Supreme Court reversed a trial court ruling that the claims against the towing company were preempted by the FAAAA, and interpreted § 14501(c)(1) to permit the vehicle owner to pursue both a statutory consumer fraud claim and a negligence claim against the towing company. The questions presented are as follows:

1. Are the Respondent's state-law consumer-fraud and negligence claims preempted because they are "related to" the "service[s]" provided by the tow truck company?

2. Are the Respondent's state-law consumer-fraud and negligence claims preempted because they are made "with respect to the transportation of property"?

PARTIES TO PROCEEDINGS IN LOWER COURT

The Petitioner is Dan's City Used Cars. Inc. ("Dan's City"), a Defendant in the proceedings below.

The Respondent is Robert Pelkey, the Plaintiff in the proceedings below.

Colonial Village, Inc., is an additional Defendant in the proceedings below, but was not a party to the New Hampshire Supreme Court appeal. It is not a party to this appeal.

CORPORATE DISCLOSURE STATEMENT

Dan's City states that it has no parent corporation. No publicly held company owns any stock of Dan's City.

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The opinion of the New Hampshire Supreme Court (Petition for Writ of Certiorari, App. 1-22) is reported at 163 N.H. 483, 44 A.3d 480 (2012). The opinion of the Hillsborough County Superior Court North (Petition for Writ of Certiorari, App. 23-33) is unreported.

JURISDICTION

The New Hampshire Supreme Court issued its decision on April 10, 2012. The Petition for Writ of Certiorari was filed on July 9, 2012. The Petition for Writ of Certiorari was granted on December 7, 2012. The jurisdiction of the Court rests on 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The pertinent parts of the FAAAA, 49 U.S.C. § 14501 *et seq.*; the federal law defining "transportation," 49 U.S.C. § 13102(23); the New Hampshire Abandoned Vehicles Law, N.H. Rev. Stat. Ann. § 262:1 *et seq.*; the New Hampshire Consumer Protection Act, N.H. Rev. Stat. Ann. § 358-A:1 *et seq.*; and the City of Manchester Code of Ordinances are reproduced in either the Appendix to

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STATEMENT OF THE CASE

A. Introduction

This case concerns the application of the preemption provisions of the FAAAA to state-law damages claims for negligence and consumer fraud against a tow truck company (Dan's City) that is alleged to have breached duties owed to a vehicle's owner when it towed his car from a parking lot to allow for snow removal, stored the car, and then

disposed of it several months later after its fees for towing and storage were not paid. The courts below reached different conclusions about preemption of these claims. The Hillsborough County Superior Court North granted summary judgment to Dan's City, holding that these claims are preempted. The New Hampshire Supreme Court reversed the grant of summary judgment, holding that neither claim is preempted. As the question of federal preemption in this case is predicated on the express language of § 14501(c)(1) of the FAAAA, the central question before the Court is whether the statutory language should be construed to encompass the Respondent's claims, such that they are preempted.

B. Statutory Background

Based on Congress's determination in 1978 that "maximum reliance on competitive market forces" would encourage lower airline fares and better airline service, it enacted the Airline Deregulation Act ("ADA"). *Morales v. Trans World Airlines*, 504 U.S. 374, 378 (1992)(quoting 49 U.S.C. App. § 1302(a)(4) (1988)). To "ensure that the States would not undo federal deregulation with regulation of their own," *id.* at 378, as well as to "prevent conflicts and inconsistent regulation," H.R. Rep. No. 95-1211, at 15 (1978), the ADA also included a preemption provision that forbade the enactment or enforcement of any State law "relating to rates,

routes, or services of any air carrier." 49 U.S.C. § 1305(a)(1). *Id.*[1]

In 1980, Congress deregulated trucking with the Motor Carrier Act of 1980. *Rowe v. N.H. Motor Transport Ass'n.*, 552 U.S. 364, 367 (2008). Fourteen years later, Congress decided to preempt state trucking regulation, as it had done with state air carrier regulation in 1978, by enacting the FAAAA. *Id.* In doing so, Congress borrowed the preemption language from the ADA, and wrote into the law the following:

> a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.

49 U.S.C. § 14501(c)(1).[2]

Congress borrowed the ADA preemption language for the motor carrier deregulation statute to ensure that motor carriers would enjoy the "identical intrastate preemption of prices, routes and services as that originally contained in the ADA." *Rowe*, 552 U.S. at 370. In doing so, Congress took explicit notice of this Court's 1992 decision in *Morales*, in which this Court determined that the term "related to" was "conspicuous for its breadth."

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[1] The ADA's preemption provision is now codified at 49 U.S.C. § 41713.

[2] The statute was originally codified at 49 U.S.C. 11501(h), and recodified in 1995 as § 14501(c)(1), as discussed below.

Morales, 504 U.S. at 384. Congress enacted the FAAAA preemption statute with full awareness of the Court's interpretation of that language in *Morales*. *Rowe*, 552 U.S. at 370 (citing H.R. Conf. Rpt. No. 103-677, at 83 (1994)).

Despite Congress's use of the same preemption language in the ADA and FAAAA, there is an important difference between the laws in how Congress dealt with the issue of what aspects of state law would be preserved from preemption. When it enacted the ADA, Congress chose not to eliminate § 1506 of the Federal Aviation Act, 49 U.S.C. § 1506, which had been in effect since 1958, and provides that "[n]othing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." The FAAAA was enacted with no general "savings clause" akin to § 1506. It was originally enacted with only limited, specific exemptions for traditional state safety regulatory authority with respect to motor vehicles; highway route controls based on vehicle size, weight or the hazardous nature of cargo; and financial responsibility requirements. 49 U.S.C. § 14501(c)(2)(A)(B).

Congress amended and recodified the FAAAA as part of the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), P.L. 104-88. The ICCTA added another specific exemption to the FAAAA's general preemption rule, allowing states and their political subdivisions to regulate the price

of non-consensual towing of motor vehicles.[3] 49 U.S.C. § 14501(c)(2)(C). The House Report accompanying the proposed version of 49 U.S.C. § 14501(c)(2)(C) stated that the proposed amendment "is only intended to permit States or political subdivisions thereof to set maximum prices for non-consensual tows, and is not intended to permit reregulation of any other aspect of tow truck operations." H.R. Rep. No. 104-311, at 119-120 (1995) reprinted in 1996 U.S.C.C.A.N. 793, at 831-32. Congress subsequently adopted the House version of this bill, and in doing so rejected a Senate amendment that would have exempted "the price and related conditions" of non-consensual towing from federal preemption. *Harris County Wrecker Owners for Equal Opportunity v. City of Houston*, 943 F. Supp. 711, 723 (S.D. Tex. 1996) (citing S. Rep. No. 104-176, at 27-28, 108 (1995)).

In 2005, Congress amended 49 U.S.C. § 14501(c) for a second time to adopt another specific exception focused solely on non-consensual tows, i.e. tows made without the knowledge or consent of the vehicle owner from private property. That amendment, 49 U.S.C. § 14501(c)(5), entitled "Limitation on Statutory Construction," provides that 49 U.S.C. § 14501(c) is not to be construed to prevent a State from requiring that the person towing a vehicle from private property have prior

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[3] By specifically employing the term "tow truck" in § 14501(c)(2)(C), the ICCTA clarified the issue of whether tow trucks are considered motor carriers for purposes of the statute. *City of Columbus v. Our's Garage & Wreckerserv., Inc.*, 536 U.S. at 424, 430 (2002).

written authorization from the private property owner, or from requiring that the private property owner be present at the time the vehicle is towed from the property, or both.

C. Decisions On Express Preemption Under the ADA and FAAAA

In *Morales v. Trans World Airlines*, the Court first interpreted the preemption provisions of the ADA. The issue was whether the ADA preempted state efforts to regulate allegedly deceptive airline advertisements through guidelines adopted by the National Association of Attorneys General (NAAG). *Id.* at 378. Numerous states had threatened to try to enforce these guidelines through their general consumer protection statutes. *Id.* The Court construed § 1305(a)(1) of the ADA broadly, based on the breadth and plain meaning of the statute's language. With regard to the intended meaning of the words "relating to" in § 1305(a)(1), the Court reasoned that "the ordinary meaning of these words is a broad one – 'to stand in some relation; to have bearing or concern; to pertain; refer; to bring in association with or connection with.'" *Id.* at 383 (citing to *Black's Law Dictionary* 1158 (5th ed. 1979)). The Court also relied on and cited prior decisions recognizing the broad sweep of the term "related to" in the preemption provision in the Employment Retirement Income Security Act of 1974 ("ERISA"). *Id.* at 384 (describing the ERISA preemption provision as having a broad scope, an expansive

sweep, broadly worded, deliberately expansive, and conspicuous for its breadth).[4]

The *Morales* Court expressly rejected the argument by the petitioners in that case that the ADA preemption provision should be construed to apply only to laws "specifically addressed to the airline industry," but not to "laws of general applicability." *Id.* at 386. The Court viewed this argument as "creating an utterly irrational loophole," since state laws could impair a federal scheme through "particularized application of general laws," contrary to the "sweep of the 'relating to' language." *Id.* Since many aspects of the NAAG guidelines were related to airline rates, they clearly fell within the preemptive scope of the law. The Court found that the NAAG guidelines would also have a "forbidden significant effect upon fares," by restricting the airlines' ability to market their product, and hence the price of the product. *Id.* at 388-390. Finally, the Court dealt with the argument that its decision might open the public to rampant deceptive advertising by airlines by noting that the Department of Transportation retained the power to prohibit such activity under federal law. *Id.* at 391.

The Court revisited the ADA preemption issue in *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 224-225 (1995). The issue was whether claims by members of an airline's frequent flyer program for breach of contract and alleged violations of the

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[4] *See also Altria Group, Inc. v. Good*, 555 U.S. 70, 85 (2008) (recognizing that the term "relating to" in the ADA "indicates Congress's intent to preempt a large area of state law to further its purpose of deregulating the airline industry").

Illinois Consumer Fraud and Deceptive Business Practices Act were preempted by the ADA. Plaintiffs challenged the retroactive application of modifications to the frequent flyer program, asserting that the changes reduced the utility of the credits plaintiffs had already accumulated. *Id.* at 225.

Based on the holding in *Morales*, the Court rejected the conclusion of the Illinois Supreme Court that the plaintiffs' claims were not preempted because a frequent flyer program is not "essential" to airline operations, and therefore not "related to" the price of an airline service. *Id.* at 226. The Court stated that *Morales* does not countenance a distinction between matters essential or non-essential to airline operations, and held that the plaintiffs' claims were clearly related to the price of airline tickets, as well as access to airline services. *Id.* The Court went on to consider whether plaintiffs' consumer protection act claims involved the enforcement of state law. The Court held that this claim was preempted, reasoning that state consumer protection act legislation is inherently intrusive because it "serves as a means to guide and police the marketing practices of airlines," and is based on state policies for consumer protection, as distinct

from the bargain between an airline and a consumer. *Id.* at 228.[5]

Rowe v. New Hampshire Motor Transport Ass'n was the Court's first chance to interpret the scope of preemption under the language of the FAAAA. The Court did so in the context of a trucking industry challenge to a Maine law requiring motor carriers to provide special delivery services designed to ensure that cigarettes were not being sold to minors. *Rowe*, 552 U.S. at 371. The Court re-affirmed its holding in *Morales* that a state law falls within the preemptive scope of the language "related to" [the price, route, or service of a motor carrier] if the state law has "a connection with, or reference to, carrier "rates, routes or services." *Id.* at 370. Following *Morales*, the Court held that the Maine law was preempted because: (i) the law was focused on trucking and other motor carrier services, thereby creating a "direct connection" with those services, and (ii) the law had a significant and adverse impact on the delivery of motor services by substituting Maine's policy commands for "competitive market forces." *Id.* at 372.

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[5] The *Wolens* Court concluded that the plaintiffs' state-law breach of contract claims were not preempted because, unlike consumer fraud act claims, they do not depend on state policies independent of the bargain struck by the parties, which cannot be enforced by private action under the ADA's preemption provision. *Id.* at 233. This case does not involve any breach of contract claim against Dan's City.

D. Proceedings Below

1. The Hillsborough County Superior Court North made its rulings based upon those facts it determined to be undisputed, as set forth in its decision. Pet. App. 23-24. The facts are taken largely from Mr. Pelkey's writ of summons,[6] J.A. 5-17, since he never submitted any affidavits or other evidence in opposition to Dan's City's motion for summary judgment. Some facts are also taken from two affidavits and other documents filed by Dan's City in connection with a series of partial summary judgment motions (described further below).[7] The New Hampshire Supreme Court's decision relies on additional facts not found by the trial court to be undisputed. In particular, the court recited as a fact "of record" that Dan's City falsely told Mr. Pelkey's lawyer that the vehicle had been sold at public auction. Pet. App. 3. However, this alleged falsehood

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[6] In New Hampshire parlance, a complaint is denominated a "writ of summons."

[7] Dan's City's summary judgment affidavits and documents are at Appellee's Appendix in the New Hampshire Supreme Court appeal (hereinafter NH App.), at 5-7; 64-76.

is not in the record.[8] The New Hampshire Supreme Court also recited as a fact "of record" that Mr. Pelkey "received no remuneration for his loss," despite the fact that the trial court made no determination whether any financial loss had occurred, since the evidence on this score was in conflict.[9]

2. The undisputed facts of record are as follows. On February 3, 2007, Dan's City towed Mr. Pelkey's car from the parking lot of a multi-family property owned by Colonial Village ("Colonial") in

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[8] Mr. Pelkey's complaint does not allege any false statement by Dan's City regarding the auction of the car. J.A. 5-17. In response to the summary judgment motions filed by Dan's City as well as his landlord, NH App. 1-8; 27-37; 48-66, Mr. Pelkey filed no affidavits to verify any of his allegations. Neither of the two trial court decisions on the parties' summary judgment motions refer to any allegation or evidence of false statements about the auction sale of the car. It is not clear where in the trial court record the New Hampshire Supreme Court may have found a basis for its unsupported statement that it was an undisputed fact that Dan's City lied to Mr. Pelkey's lawyer about the sale.

[9] Mr. Pelkey's complaint alleges a financial loss, but he never supported his complaint with any evidence of a loss, despite the provisions of New Hampshire law, which parallel the language of Rule 56 of the Federal Rules of Civil Procedure, providing that a party opposing summary judgment may not rely on the "bare allegations" of a complaint in opposing summary judgment. N.H. Rev. Stat. Ann. 491:8-a(IV). Moreover, the facts set forth in the Dan's City affidavits were deemed admitted by Mr. Pelkey's failure to rebut them in any way. *Id.* at 491:8-a(II). One of Dan's City's affidavits stated that when the Pelkey car was towed, it was locked, had significant pre-existing damage, had a flat tire, and appeared to be used for storage. NH App. 65.

Manchester, New Hampshire, where Mr. Pelkey lived. Pet. App. 24.[10] As Mr. Pelkey's landlord, Colonial had established a policy requiring tenants to move their vehicles to accommodate snow removal from the parking lots. NH App. 9. Under this policy, a tenant's vehicle can be towed at the tenant's expense if not moved by a tenant when necessary. NH App. 10. Mr. Pelkey was aware of the Colonial snow policy, and had complied with it in the past. J.A. 8, ¶ 8.

It snowed on February 3, 2007. Mr. Pelkey's vehicle was one of a number of vehicles towed by Dan's City from the Colonial parking lot that day. NH App. 5, ¶4. When Mr. Pelkey's vehicle was towed, it was damaged and had a flat tire. NH App. 65, ¶3. The vehicle looked like it was being used for storage, and Dan's City had no way to determine if the vehicle even ran, as it was locked. *Id.*

When it towed the vehicle, Dan's City did not know the identity of the vehicle owner. This information was not publicly available to tow truck operators at the time of the towing.[11] NH App. 65, ¶2-4. When the vehicle had not been claimed within 30 days, Dan's City, as required by New Hampshire

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[10] Citations to "Pet. App." are to the Appendix to Dan's City's Petition for Writ of Certiorari.

[11] The statute was later amended in 2010 to allow a custodian of a towed vehicle to obtain the name and last known mailing address of the last registered owner from a law enforcement officer. 2010 N.H. Laws, Ch. 262 (eff. Sept 18, 2010)(current N.H. Rev. Stat. Ann. § 262:37-a).

law regulating abandoned motor vehicles,[12] submitted a TDMV 71 form to New Hampshire's Division of Motor Vehicles. NH App. 65. The TDMV 71 form is completed by a garage owner when a towed vehicle is considered abandoned or unclaimed. NH App. 65, ¶4. Dan's City knew that it's submission of the TDMV 71 form would provide it with the name of the vehicle's last registered owner. NH App. 65, ¶4. The report to DMV stated that the vehicle's market value was less than $500 and that it was not in a condition for legal public way use. NH App. 65.

On March 29, 2007, the New Hampshire Division of Motor Vehicles notified Dan's City that Mr. Pelkey was the vehicle's last registered owner and that notice of the sale should be sent to him by mail at least 14 days before the sale. NH App. 67. Dan's City sent Mr. Pelkey a certified letter stating that his vehicle had been towed and that Dan's City considered it abandoned. NH App. 6, ¶9; 11. The Post Office returned this letter to Dan's City as undeliverable because the addressee had "moved, left no address." *Id.* Not having received any claim for the car, Dan's City proceeded with its plans to auction the vehicle on April 19, 2007, for the unpaid towing and storing charges. Unbeknownst to Dan's City, Mr. Pelkey had been hospitalized on February 12, 2007, and had remained so until April 9, 2007. During the hospitalization his left foot was amputated, and he suffered a heart attack. J.A. 8-9, ¶ 10.

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[12] N.H. Rev. Stat. Ann. § 262:2(III) is the source of this reporting requirement. App. 7.

In his complaint, Mr. Pelkey alleges that he was bedridden at the time his vehicle was towed and did not become aware of its towing until after he was released from the hospital in April of 2007. J.A. 10, ¶12. About a week later, in response to an inquiry from Pelkey's counsel about the whereabouts of his client's car, Colonial's counsel told Mr. Pelkey's counsel that the vehicle had been towed and was scheduled to be sold at public auction on April 19, 2007. Pet. App. 24-25. Mr. Pelkey's counsel then sent a letter to Dan's City advising that Mr. Pelkey had not abandoned his vehicle, and wanted to "arrange for its return as expeditiously as possible." J.A. 9, ¶12. Mr. Pelkey does not allege in his pleadings that he offered, before the auction date, to pay the towing and over two months of storage charges incurred, or that he tendered the unpaid towing and storage fees.[13]

It is undisputed that neither Mr. Pelkey nor his counsel attended the April 19, 2007 auction. No third parties bid on Mr. Pelkey's damaged and locked car. NH App. 6, ¶7. Mr. Pelkey's vehicle remained

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[13] Despite Mr. Pelkey's failure to allege any offer or tender of the fees due, and his allegation instead that his counsel sent a letter denying abandonment and seeking "to arrange for the return of the vehicle as expeditiously as possible," J.A. 9, ¶12, the trial court mistakenly stated as a fact that Mr. Pelkey's counsel had informed Dan's City that his client wanted to pay any charges owed and reclaim his vehicle. Pet. App. 25. There is no evidence in the record of any offer by Mr. Pelkey to pay all the towing and storage charges, nor of any tender of payment for those charges. The only evidence in the record on this point is Mr. Pelkey's offer, made after the car had already been stored for close to four months, to pay towing charges *only*. NH App. 86-87.

at Dan's City for weeks following the failed auction. NH App. 6, ¶7. During this period of time, Mr. Pelkey could still have paid all of the towing and storage charges and claimed his car. Several weeks after the failed auction, however, Mr. Pelkey's counsel sent a letter to Dan's City disputing Pelkey's obligation to pay any storage charges because of the circumstances surrounding the tow. NH App. 86-87.

Dan's City ultimately disposed of the vehicle through a trade, after spending $2,700 to repair it to make it roadworthy. Pet. App. 25; NH App. 54. The parties dispute whether Dan's City obtained any value from the trade in excess of the unpaid towing and storage charges, the costs of the failed auction sale and the repairs.

3. The dispute between Mr. Pelkey and Dan's City was one part of a larger dispute that also involved Colonial's alleged liability to Mr. Pelkey for having his car towed, failing to provide him with notice of the towing and failing to arrange for the return of his car to him. J.A. 5-11.

Mr. Pelkey filed suit against Colonial and Dan's City, alleging that Colonial knew about his health problems and his related absences from his apartment; that Colonial had a duty to tell him that his car was towed during the February 3 snow event; that Dan's City could have identified him as the owner of the car because of a Colonial parking sticker on the car; and that Colonial was liable to him under the consumer protection act as an alleged agent of Dan's City, as well as in its own right. J.A. 13, ¶29-31.

The complaint contains six counts: two against Dan's City alone (Counts I-II), two against Colonial

alone (Counts III-IV), and two against both Colonial and Dan's City (Counts V-VI). Count I alleges Dan's City violated New Hampshire's Consumer Protection Act, N.H. Rev. Stat. Ann. § 358:A-2, for allegedly making false statements to the N.H. Department of Motor Vehicles relating to his vehicle, and allegedly failing to follow unspecified procedures set forth in N.H. Rev. Stat. Ann. 262, a portion of which regulates the towing and disposal of vehicles towed at the request of a private party without the knowledge and consent of their owners.[14] J.A. 12-13. In Count II, Mr. Pelkey claimed that Dan's City breached common law and statutory duties under Chapter 262 to use reasonable care to ascertain the identity of a vehicle's owner, to return it to him and to use reasonable care in disposing of the vehicle. Counts III and IV against Colonial are claims for violation of the N.H. consumer protection act and breach of contract. Counts V and VI are claims

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[14] Mr. Pelkey did not identify any specific statutory procedures Dan's City allegedly failed to follow. The New Hampshire statute that authorizes the towing and removal of a vehicle from private property by its owner, and puts the responsibility for paying towing and storage charges incurred on the owner of the vehicle, is N.H. Rev. Stat. Ann. § 262:40-a(I)(IV). Section 262:36-a of the law establishes procedures for disposal of such vehicles by a storage company if it is not timely claimed; § 262:37 authorizes sale at public auction; § 262:38 governs notice of sale; and § 262:39 governs application of the proceeds of the sale. In its Order, the New Hampshire Supreme Court incorrectly referenced N.H. Stat. Ann. § 262:32 and § 262:33, Pet. App. 12, both of which are applicable only in situations where an authorized official, defined in N.H. Stat. Ann. § 259:4 as a police employee, is involved in the tow. App. 4. There is no allegation in this case that a police employee was involved in the towing of Mr. Pelkey's vehicle.

against both defendants for breach of New Hampshire statutes prohibiting the seizure or withholding by a landlord of a tenant's property, without judicial process, and for violation of the federal Fair Housing Act, 42 U.S.C. § 3602.

4. Initially, both defendants moved for partial summary judgment on Counts III, V and VI. The trial court granted these motions in all respects, except as to Mr. Pelkey's claim alleging that Colonial is liable for the acts of its alleged agent (Dan's City) for consumer fraud, and the claim against Colonial for violation of the landlord-tenant law prohibiting the seizure and withholding of tenant property by a landlord. N.H. App. 9-26.

5. Dan's City thereafter moved for summary judgment on all remaining counts against it (I and II), asserting (among other grounds for summary judgment) that it was a motor carrier of property, that Mr. Pelkey's claims arose out of towing and storage services provided by Dan's City, and that all of these claims were preempted by 49 U.S.C. § 14501(c)(1). NH App. 38, 48. On December 17, 2010, the trial court granted Dan's City's motion for partial summary judgment, holding that the consumer protection act and negligence claims asserted in Counts I and II are preempted because the claims "relate specifically to Dan's City's handling of the vehicles it tows, i.e., its service regarding the property it transports, and expressly seek the enforcement of state laws related to duties owed stemming from the transportation of property." J.A. 32.

6. In its decision, the New Hampshire Supreme Court reversed, holding that Mr. Pelkey's consumer protection act and negligence claims are

not preempted. Pet. App. 22. The court reasoned that despite the broad preemptive reach of the language of § 14501(c)(1) of the FAAAA, Congress did not intend to displace the state-law causes of action asserted by Mr. Pelkey because such claims are not "sufficiently 'related to' a towing company's 'service' to be preempted." Pet. App. 16. The court also concluded that Mr. Pelkey's claims do not constitute state claims "with respect to the transportation of property." Pet. App. 13. In the court's view, Mr. Pelkey's claims "have nothing to do with the transportation of property; they involve the balance of rights between a lien creditor . . . and the owner of a vehicle." Pet. App. 14. The court also opined "that the absence of any federal remedy for private injuries of the kind allegedly suffered by the plaintiff also supports the inference that Congress did not intend to displace the operation of state-laws in this context." Pet. App. 20.[15]

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[15] In reaching this decision, the New Hampshire Supreme Court rejected contrary decisions from the Alabama Supreme Court and the Sixth Circuit Court of Appeals, essentially adopting the position of the dissent in both of those cases. *See Weatherspoon v. Tillery Body Shop, Inc.*, 44 So. 3d 447, 459 463 (Ala.2010) (Murdock, J. dissenting); *Ware v. Tow Pro Custom Towing and Hauling, Inc.*, 289 Fed. Appx. 852, 858-860 (6th Cir. 2008) (Griffin, J. dissenting)(not selected for publication).

SUMMARY OF ARGUMENT

1. a. This Court's jurisprudence on the scope of express preemption under § 14501(c)(1) recognizes the broad sweep of the statutory language. That language is not ambiguous, nor unclear. The Court has stated repeatedly that the ordinary, expansive meaning of the phrase "related to" is to be respected, bringing any state-law that has "an association with, or connection" to the price, route or service of a motor carrier within the preemptive scope of the law. The relationship between Mr. Pelkey's state tort claims and the services provided by Dan's City is easily strong enough to bring those claims within the broad preemptive scope of the law.

b. Mr. Pelkey's damages claims are "related to" the "services" provided by Dan's City, in both a logical and practical sense. Dan's City legally towed Mr. Pelkey's vehicle, and stored it, expecting to be paid for services rendered. Due to unfortunate circumstances unknown to Dan's City and not of its making, the vehicle remained unclaimed for more than two months, triggering the normal process for sale and disposition of abandoned vehicles. This process exists to ensure payment to tow truckers for their towing and storage of vehicles that are never claimed. Whenever a vehicle is towed, stored and not claimed for an extended period, the potential arises for the vehicle owner to dispute liability to pay all charges. Disputes are inevitable and almost inherent in the process. It defies logic to suggest that the actions of the tow trucker in connection with disposition of the vehicle are not associated or connected with the towing and storage services in the first instance. And as a practical matter, it is

self-evident that tow truckers would not provide the essential service of towing vehicles (when necessary for public safety or otherwise) if there were no assurance of payment if the vehicle is abandoned. This assurance is provided by the statutory sale process available under New Hampshire law. As is the case with any service provider, payment for services is an integral and indispensable element of any service transaction.

c. The New Hampshire Supreme Court ruled that Mr. Pelkey's claims are not preempted based on facts not in the record, and an artificial distinction between the towing and storage services rendered by Dan's City and the process involved in disposing of abandoned vehicles. The court also erred by failing to recognize that a core aspect of Mr. Pelkey's claims - the assertion that Dan's City had a duty to attempt to locate him when he did not claim his vehicle - was directed at conduct before sale. Allowing such a claim to avoid preemption would result in a large expansion, mandated by state tort law, of the scope of services that a tow trucker must provide whenever a towed vehicle is unclaimed.

d. Upholding preemption of Mr. Pelkey's damages claims does not open New Hampshire citizens to unfettered abuse by unscrupulous towing companies, as the New Hampshire Supreme Court decision suggests. Although inapplicable here, the criminal law exists to deter conversion and theft of consumer property, including non-consensually towed vehicles. Violation of the New Hampshire statute on handling abandoned motor vehicles subjects tow truckers to misdemeanor and possible felony charges if fraud is involved in registering a vehicle after it is towed. A consumer report of

conversion of a towed vehicle can prevent a purchaser's registration of the vehicle. The Court's decisions also leave room for intentional and outrageous actions by tow truckers to be found beyond the scope of FAAAA preemption as too far removed from the scope of services ordinarily provided by tow truckers. As no such conduct is involved in this case, the Court need not decide where precisely to draw this line.

2. a. Congress defined the term "transportation" broadly to encompass towing, storage of towed vehicles and any duties owed stemming from these activities. That broad definition must be given effect.

b. The New Hampshire Supreme Court focused incorrectly on whether the New Hampshire statutory scheme for handling abandoned vehicles is a state-law "with respect to the transportation of property." That focus was misplaced because no party challenges the enforcement of the New Hampshire statutory scheme in this case; in fact, Mr. Pelkey seeks to enforce parts of it privately via a negligence *per se* claim. The relevant question not addressed by the court below is whether Mr. Pelkey's state-law tort claims are based on alleged conduct that falls within the statutory definition of "transportation." The answer to this question is that the tort claims are sufficiently connected to the transportation of property to be preempted.

3. a. None of the statutory exceptions to preemption apply in this case.

b. To the extent it is relevant to this Court's determination whether Congress intended to preempt the specific types of tort claims made by him, Mr. Pelkey is not left without a remedy for the

harm he alleges to have suffered. He retains all available remedies against his landlord. Preemption of his triple damages claims against Dan's City in this action would not limit any of his claims against his landlord based on the landlord's alleged breaches of duties owed to him, who as the party that initiated the towing of the vehicle was in the best position to give Mr. Pelkey notice of the towing.

ARGUMENT

I. MR. PELKEY'S CLAIMS ARE PREEMPTED BECAUSE THEY RELATE TO THE TOWING AND STORAGE SERVICES PROVIDED BY DAN'S CITY.

The language used by Congress in § 14501(c)(1) of the FAAAA expresses a "broad preemptive purpose," *Morales*, 504 U.S. at 383; *Rowe*, 552 U.S. at 370, as the Court has repeatedly emphasized. *See Wolens*, 513 U.S. at 225-26; *id.* at 235 (Stevens, J., concurring in part and dissenting in part); *Morales*, 504 U.S. at 383-84; *see also Rowe*, 552 U.S. at 377 (Ginsburg, J., concurring) (noting the "breadth of [the] preemption language" in the FAAAA). This understanding is shared by Congress, as reflected in the FAAAA's legislative history. H.R. Conf. Rep. No. 103-677, at 85 (1994)(expressing agreement with the "broad preemption interpretation adopted by the United States Supreme Court in *Morales*").

Tellingly, Congress has enacted five specific exceptions to the broad general rule of preemption in § 14501(c)(1). This is a clear indicator of its intent to

allow states to regulate motor carriers of property only in the areas delineated in these express exceptions (two of which specifically apply to tow truckers). *See* 49 U.S.C. § 14501(c)(2)(A) (safety regulatory authority); § 14501(c)(2)(B) (intrastate transportation of household goods); § 14501(c)(2)(C) (regulation of prices charged for non-consensual tows); § 14501(c)(3) (intrastate transportation of property related to uniform liability rules and other matters); and § 14501(c)(5) (other permitted state regulation of non-consensual tows).[16] This statutory history reflects that Congress has purposefully established a broad general rule of preemption, while at the same time recognizing that the general rule must give way in discrete areas where it has deemed state regulation appropriate. *See, e.g.*, H.R. Rep. 104-311, at 120 (1995)(explaining that the exception for regulation of the price of non-consensual towing "struck a balance between the need to protect consumers from exorbitant towing fees and the need for a free market in towing services"). When a statutory provision sets forth a general rule followed by specific exceptions to that rule, one must assume – absent other evidence – that no further exceptions are intended. *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 719 (1991). (Scalia, J. dissenting).

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[16] Section 14501(c)(5) is denominated in the statute as a "limitation on statutory construction," but is worded in such a way as to operate like all the other exceptions to the pre-emptive scope of the general rule in § 14501(c)(1). It allows states to require that, in the case of non-consensual tows from private property, the towing company have prior written authorization from the property owner, that the owner be present at the time of the tow, or both.

Although Congress specifically preserved the safety regulatory authority of states with respect to motor vehicles when it enacted the FAAAA, there is otherwise no general "savings clause" preserving any general state remedies or regulatory authority, as is the case in the ADA. To the extent the Court has interpreted the preemptive scope of the ADA with reference to its general savings clause,[17] that authority should have no bearing on the proper interpretation of the preemptive scope of the FAAAA.

This Court's decisions in *Morales* and *Wolens* establish two distinct requirements for a law to be expressly preempted under the ADA: (1) a state must "enact or enforce" a law, regulation or other provision that (2) "relates to" motor carrier prices, routes, or services *either* (i) by expressly referring to them *or* (ii) by having a significant economic effect upon them. *See S.C. Johnson & Son v. Transport Corp. of America*, 697 F.3d 544, 553 (7th Cir. 2012)(applying similar analysis to preemption of state-law tort claims under ADA). Under the FAAAA, there is a third requirement: the state

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[17] In *Wolens*, the Court's holding – that breach of contract claims such as those asserted in that case were not preempted by the ADA – was based upon the ADA's preemption clause "read together with the FAA's savings clause." *Wolens*, 513 U.S. at 232-233. The *Wolens* Court did not attempt to reconcile this ruling with the Court's analysis of the effect of the ADA savings clause in *Morales*, which treated the ADA savings clause as a "relic of the pre-ADA/no preemption regime," 504 U.S. at 385, and concluded that such a general savings clause did not indicate that "Congress intended to undermine this carefully drawn statute through a general savings clause." *Id.*

enforcement action must be "with respect to transportation."[18]

The first requirement is not at issue in this case as Mr. Pelkey's claims are no doubt the type of state actions that can be preempted under the FAAAA. State consumer fraud actions and tort actions constitute enforcement of state-laws for purposes of the ADA and FAAAA. *Wolens*, 513 U.S. at 227-228.

The second requirement is met in this case because Mr. Pelkey's claims *both* expressly refer to the services provided by Dan's City, and have a significant economic effect upon services delivered by tow truck companies.

A. Mr. Pelkey's Negligence and Consumer Fraud Claims Are Directed At Services Provided By Dan's City.

As the New Hampshire Supreme Court stated, "[f]airly read, the theories upon which the plaintiff's claims rest advance the right of a person whose vehicle has been towed to retrieve it upon payment of towing and storage charges." Pet. App. 20. The court described the focus of the claims to be the "management and disposition of a towed vehicle." *Id.*

The gravamen of Mr. Pelkey's negligence claim, as pleaded, was that Dan's City breached duties under New Hampshire statutes (N.H. Rev.

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[18] This requirement of the law is discussed in Section II, *infra*.

Stat. Ann. Ch. 262) governing abandoned motor vehicles, as well as the common law, "to use reasonable care to ascertain the identity of the owner of [Mr. Pelkey's vehicle], . . . to use reasonable care in disposing of the vehicle . . . . and to make reasonable efforts to return the vehicle to Mr. Pelkey." J.A. 12-13, ¶25, 26.

The focus of the consumer protection act claim was allegedly deceptive and false statements to the New Hampshire DMV regarding the vehicle's value, its condition, whether it was abandoned, and whether any inquiry had been made to identify its owner. *Id.* ¶19. Dan's City also allegedly committed a deceptive act by "failing to cancel a scheduled auction when the identity of the owner and the circumstances of the delay in recovering the vehicle were made known to Dan's City." *Id.* This count of the complaint also alleged unspecified violations by Dan's City of the abandoned motor vehicle statute (N.H. Rev. Stat. Ann. Ch. 262). *Id.*

Although both the consumer protection act and negligence counts of the complaint alleged violations of Ch. 262 by Dan's City, that law provides no private right of action to consumers, nor has one been recognized. Thus Mr. Pelkey could assert no cause of action directly under Ch. 262, nor did his complaint purport to do so. J.A. 11-13. New Hampshire does recognize the negligence *per se* doctrine, under which the standard of conduct to which a defendant is held may be defined by an applicable statute, rather than the common-law reasonable-person standard. *Marquay v. Eno*, 662 A.2d 272, 277 (N.H. 1995). To the extent the complaint relies on Ch. 262 as the basis for any alleged duty owed by Dan's City, it has to be treated

as asserting a negligence *per se* claim, not a statutory claim under Ch. 262.[19]

The negligence claim is specifically directed at Dan's City's obligations as a provider of towing services, in particular, the legal duties owed by a towing company that has towed and stored a vehicle, and has reason to believe it is abandoned. The negligence claim seeks to impose a duty on Dan's City to protect Mr. Pelkey's interests, by undertaking to locate him after mail sent to him was returned as undeliverable, and to negotiate with him over payment of towing and storage fees due on account of his personal circumstances that led to his long delay in claiming his vehicle. These are all duties the marketplace does not recognize, but which Mr. Pelkey seeks to impose on Dan's City via New Hampshire negligence law. This brings the negligence claim squarely within the FAAAA's preemptive scope. *S.C. Johnson & Son*, 697 F.3d at 557 (Congress decided that it did not want states to displace the market by permitting claims against motor carriers for fraudulent misrepresentation and conspiracy to commit fraud, which substitute state

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[19] One of the issues discussed in the New Hampshire Supreme Court's decision is whether the provisions of Ch. 262 are preempted by the FAAAA. Pet. App. 12-14. This discussion is presumably based on the incorrect premise that Mr. Pelkey could assert a statutory claim under Ch. 262, even though no private right of action exists under that law, either expressly or by implication. But since Mr. Pelkey only asserts consumer protection act and common law negligence claims, and could not assert a private right of action under Ch. 262 (which does not exist under New Hampshire law), any discussion of whether the FAAAA preempts Ch. 262 is unnecessary.

policy (embodied in law) for duties created by the market).

Mr. Pelkey's consumer fraud claim is similarly focused on Dan's City's conduct as a motor carrier involved in towing and storing motor vehicles, i.e., the alleged deceptive statements made by Dan's City in the course of reporting to state authorities its possession of an abandoned vehicle, and seeking permission to sell it as such.

To the extent Mr. Pelkey's claims are predicated on actions taken by Dan's City with respect to the disposition of the vehicle, after receiving notice from him that he claimed it and wished to arrange for its return, those claims still fall within the preemptive scope of the law. These actions were taken by Dan's City to obtain payment for services rendered. Mr. Pelkey's position is that Dan's City had a legal duty to refrain from disposing of the vehicle and negotiate with him over the fees he would have to pay, due to the circumstances surrounding the tow and the long delay in his claim for the vehicle. This aspect of the dispute is no less directed at Dan's City's services because it relates to payment for Dan's City services, as opposed to actual delivery of the services. Ruling on FAAAA preemption of a similar claim directed at an alleged fraudulent billing charge by a motor carrier, the Eighth Circuit held in *Data Manufacturing v. United Parcel*, 557 F.3d 849, 852 (8th Cir. 2009), that the billing charges involved in the dispute were part of the defendant's operations, and that it was "disingenuous to suggest that UPS' billing procedures were not a necessary component of its business operations." Because the various tort claims challenging the billing practice in question

were all based on state-law policies, the court found them all preempted. *Id.* at 853-54.

The same conclusion is warranted here. Mr. Pelkey's claims were all directed at the normal daily activities of a tow truck operator that comes into possession of a vehicle that appears to be abandoned because it is not claimed for more than 30 days. It is disingenuous to suggest that these activities are not part of the everyday business conducted by tow truck operators and are not "related to" Dan's City's services as such.

The New Hampshire Supreme Court, without any discussion of the series of specific exemptions to the broad general rule of preemption enacted by Congress (including the two specifically directed at non-consensual towing of motor vehicles), concluded that Congress did not intend § 14501(c)(1) to apply to the claims in this case. To support its conclusion, the court relied upon the presumption that "the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Pet. App. 10 (citing *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)).

The New Hampshire Supreme Court's invocation of the "presumption against preemption" was unfounded and not consistent with this Court's decisions. First, as explained by the Court in *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996), this presumption has been invoked as an aid to interpretation of express preemption statutes to give proper respect to "federalism concerns and the historic primacy of state regulation of matters of *health and safety*." (emphasis added). Unlike cases involving regulation of medical equipment and tobacco, this case does not involve any health or

safety concerns. Second, it is questionable whether this presumption applies at all to the question whether a federal law is intended to preempt a specific state-law or cause of action, as opposed to the question of whether Congress intended any preemption at all. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 545-546 (1992)(Scalia, J., concurring in judgment in part and dissenting in part). Third, even in cases involving the intended scope of an express preemption statute, there is no room for operation of the presumption unless the language used by Congress is ambiguous. *Id.* at 533 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). In cases of express preemption, especially those like this case that do not involve health and safety, the "presumption against preemption" should carry little or no weight. *Wyeth*, 555 U.S. at 566 (2009)(Alito, J. dissenting)(no presumption against preemption should obtain where federalism concerns arising out of the historic primacy of state regulation of matters of health and safety are not present).

The New Hampshire Supreme Court's analysis in this regard is a classic example of the deployment of questionable aids to interpretation as a way to avoid results mandated by the text of the law. While some disagreement may exist as to the appropriate means for ascertaining Congressional intent on the precise scope of preemption from broadly worded preemption language, there is no disagreement on one fundamental proposition: The starting point is always the explicit statutory language and the structure and purpose of the law. *Morales*, 504 U.S. at 383. If intent to preempt broadly is evident from the text of the law, broad

preemption follows, even if it leaves a "large regulatory gap" or forecloses certain categories of private liability claims. *Rowe*, 552 U.S. at 377 (Ginsburg, J., concurring)(finding preemption of Maine Tobacco Delivery Law based on clear FAAAA language, despite the "large regulatory gap" left by the decision).

The language of the FAAAA is clear. Congress intended to broadly preempt all state laws or state-law claims within the language of the law. *Cippollone*, 505 U.S. at 548 (Scalia, J., concurring in judgment in part and dissenting in part)(where preemption language indicates it is "intended to sweep broadly, our construction must sweep broadly as well"). The FAAAA is structured with a series of specific exemptions, none applicable here, by which Congress has permitted state regulation of tow truck companies where it has deemed appropriate. Congress has also explicitly permitted states to regulate the conduct of owners of private property who order the towing of a vehicle without the owner's consent. This exception indicates explicit Congressional intent to protect tow truck companies from the types of claims involved in this case, while allowing states to require a greater level of responsibility for those parties that initiate non-consensual tows of vehicles from private property.

Because the New Hampshire Supreme Court's conclusions as to the FAAAA's intended scope, as applied to tow truck companies, is (i) inconsistent with the text of the law, its structure, and this Court's precedents interpreting the law, and (ii) do not follow the accepted methodology for analyzing express preemption, they should be rejected.

B. The Term "Services" In Section 14501(c)(1) Includes The Activities Of Dan's City That Mr. Pelkey Alleges To Be Actionable.

Alternatively, the New Hampshire Supreme Court ruled that the claims in this case are not preempted on the theory that the activities of Dan's City that are the subject of Mr. Pelkey's claims are not "services" within the meaning of § 14501(c)(1). Pet. App. 16-17. This Court has not had occasion to interpret the meaning of this term, although the majority of the Circuit Courts that have done so (in both ADA and FAAAA cases) hold that it encompasses not only the activities involved in the actual delivery of an airline or motor carrier's service, but also the activities that are incidental to and distinct from the actual transportation services provided. *See Data Manufacturing*, 557 F.3d at 852; *Air Transport v. Cuomo*, 520 F.3d 218, 223 (2d Cir. 2008); *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1433 (7th Cir. 1996); *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336-39 (5th Cir. 1995) (en banc); *see also Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1257 (11th Cir. 2003) (referring to the *Hodges* definition as the "more compelling" of the alternative definitions that have been adopted); *Smith v. Comair, Inc.*, 134 F.3d 254, 259 (4th Cir. 1998); *Chukuru v. Bd. of Dirs. British Airways*, 889 F. Supp. 12, 13 (D. Mass. 1995) (adopting the *Hodges* definition), *aff'd mem. sub nom. Azubuko v. Bd. of Dirs. British Airways*, 101 F.3d 106 (1st Cir. 1996); *contra Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259-1263 (9th Cir. 1998) (en banc); *accord Taj Mahal Travel, Inc. v.*

Delta Airlines, Inc., 164 F.3d 186, 193-94 (3d Cir. 1998).

The New Hampshire Supreme Court followed the minority of courts that give a narrow scope to the meaning of the term "services," one that has not found favor with many other courts, and one that has been aptly described by the Second Circuit as "inconsistent with the Supreme Court's decision in *Rowe*." *Air Transport*, 520 F.3d at 223. Even though the Maine regulations at issue in *Rowe* were found by the Court to have a somewhat indirect effect on motor carriers, the Court nevertheless found the law to have a significant impact on the services of carriers because they would be required to deliver their services in a manner different from what the market would otherwise dictate. 552 U.S. at 371-72.[20]

The Court decided in *Morales* that the ADA preempts state efforts to regulate advertising *about* air carrier rates and services. *Rowe* ruled that Maine's effort to regulate the services themselves are preempted. *Id.* at 375. Most lower courts have found the term "services" to be broad enough to encompass matters incidental to and distinct from the actual transportation services themselves. Moreover, the Court in *Wolens* expressly rejected any distinction

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[20] In its brief as *amicus curiae* in *Rowe*, the United States advocated a broad interpretation of the term "services" as used in § 14501(c)(1), based upon Congress's broad definition of the term "transportation," which it pointed out encompasses "services" related to the movement of property, "including receipt, delivery, . . . and handling of property." Brief For The United States As Amicus Curiae Supporting Respondents, *Rowe* (No. 06-457), at 24-25.

between matters "essential" and "unessential" to a business's operations. *Wolens*, 513 U.S. at 226. Resolution of disputes over billing and payment for services is a core aspect of the mission of any service organization. As the Eight Circuit stated in *Data Manufacturing*, it would be disingenuous to suggest otherwise. 557 F.3d at 852.

For these reasons, the Court should reject the New Hampshire Supreme Court's conclusion that Mr. Pelkey's claims are not preempted because they do not relate to a motor carrier's "services."

C. Permitting Claims Like Those Asserted By Mr. Pelkey To Avoid Preemption Will Also Have A Significant Impact On Tow Truck Services.

Even if the effect of a state law on the price, route or services of motor carriers is indirect – in the sense that a law is not directed at or does not reference price, routes, or services – the law is still preempted if it has a significant impact on the services that motor carriers provide. *Morales*, 504 U.S. at 385-86, 390; *Rowe*, 552 U.S. at 372. In this case, the Court can readily conclude that allowing claims such as Mr. Pelkey's avoid preemption would directly impact the prices and services of tow truckers.

State and local governments can regulate the price of non-consensual towing and storage, and the City of Manchester, NH has done so. Manchester, NH, Code of Ordinances, ch. 70, § 70.40 (2011) (capping towing charges at $70 during regular hours

and $85 at other times, and $25/day for storage.) Price regulation such as this is permitted under 49 U.S.C. § 14501(c)(2)(C). Allowing negligence claims against tow truck drivers based on the premise that they have a state-law duty to use reasonable care to locate the owners of towed vehicles who do not claim their vehicles, where state juries will decide whether a reasonable level of effort is made in any given case, would subject tow truck drivers to the vagaries of each state's law. *See Reigel v. Medtronic*, 552 U.S. 312, 325 (2008)(state tort law, applied by juries, is less deserving of preservation from preemption because it is not subjected to cost–benefit analysis as applied by state legislators or regulators to statutes and regulations).

Who is to bear the cost and expense of such efforts, and how far must they extend? Would tow truck companies continue to tow apparently abandoned vehicles for a capped fee without knowing if they would be liable for not searching far and wide enough for the owner? The answers of course are a matter of state policy, which would likely be different in different states. This is precisely what Congress intended to prevent with § 14501(c)(1). *Wolens*, 513 U.S. at 232-233 (breach of contract claims, unlike consumer fraud claims, are not preempted because they do not dictate a state substantive standard of conduct for what the marketplace would dictate).

On this point, the argument for preemption of Mr. Pelkey's consumer fraud claim is even stronger than the argument as to his negligence claim. This claim seeks to impose a duty on tow truck drivers in New Hampshire, enforceable by an award of triple

damages and legal fees,[21] to cancel a scheduled sale of an abandoned vehicle if it is claimed by an owner before the scheduled sale, whether or not the owner has tendered towing and storage fees owing. J.A. 11-12, ¶¶19-23. The remedy sought goes far beyond any compensation for any loss that Mr. Pelkey may have suffered.

As one court of appeals has observed, intrusive regulation of business practices is inherent in state consumer protection laws. *S.C. Johnson & Son,* 697 F.3d at 559 (because "the amount (if any) of necessary regulation is hotly debated," there is a wide variance in these laws from state to state). "One state's deceptive practice might be another state's hard bargain." *Id.* at 557 (citing Chad DeVeaux, *Lost in the Dismal Swamp: Interstate Class Actions, False Federalism, and the Dormant Commerce Clause*, 79 Geo. Wash. L.R. 995, 1021 (2011) (state consumer protection laws "vary substantially, imposing myriad 'different . . . substantive elements, including differing requirements of privity, demand, scienter and reliance'")). Because state consumer protection laws containing well-meaning but widely varying provisions are designed to protect consumers from the rigors of the market, the Court had no difficulty finding them within the ADA's preemptive scope in *Morales* and *Wolens*. It should likewise do so here.

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[21] The availability of triple damages for a violation of the New Hampshire consumer protection act represents a clear state policy judgment that enhanced damages are needed to deter violations of the law in cases of willful conduct. That policy judgment is New Hampshire's to make; it simply cannot be imposed on motor carriers under the FAAAA in a case such as this one. *See* N.H. Rev. State. Ann. §358A-10.

D. The FAAAA Does Not Have To Be Interpreted Narrowly, Contrary To Existing Precedent, To Deal With Exceptional Cases Involving Outrageous Conduct By Motor Carriers.

The Court has more than once stated that the reach of preemption under the FAAAA is not unlimited, and will not extend to state actions that affect prices, routes, and services in a tenuous, remote, or peripheral manner. *Morales*, 504 U.S. at 390; *Wolens*, 513 U.S. at 224. However, it has also stated in these cases that Congress's primary purpose in enacting the FAAAA was to free motor carriers from any form of state or local regulation of their prices, routes, or services with respect to transportation, leaving to the free market (or federal law) the development of competitive standards of conduct and business practice, unless different duties are voluntarily undertaken by contract.

Lower court decisions, dealing with claims of outrageous conduct by air carriers, unrelated to their mission of delivery of air transportation service, have addressed those claims easily under the Court's existing precedents. For example, in *Rombom v. United Air Lines, Inc.*, 867 F. Supp. 214 (S.D.N.Y. 1994), the court dealt with claims arising out of an incident where a passenger was removed from an aircraft before departure for unruly conduct. *Id.* at 216. The court held all plaintiff's claims to be preempted to the extent they sought to impose liability on the airline for actions of its employees that implicated the way in which the employees performed their regular duties, so long as the alleged

conduct was not so outrageous that it could be said to go beyond the normal duties of the employee. *Id.* at 223. Only one claim was found to be beyond preemption at the summary judgment stage, in which the plaintiff had alleged that after her removal from the aircraft, the flight crew had her arrested out of spite. Since this alleged conduct was so outrageous as to be beyond the scope of an airline employee's regular duties, it was not preempted for lack of a meaningful connection between the alleged wrongful conduct and airline services. The effect of this claim on airline services was too tenuous to be preempted. *Id.* at 224.

In *Smith v. Comair*, 134 F. 3d 254 (4th Cir. 1998), the Fourth Circuit also recognized that "[s]uits stemming from outrageous conduct on the part of an airline toward a passenger will not be preempted under the ADA if the conduct too tenuously relates to or is *unnecessary* to an airline's services." *Id.* at 259 (citing *Rombom*)(emphasis added).

These decisions are arguably distinguishable from this case in that they are based in part on the tension between the ADA's broad preemption language, and its general savings clause. *See Rombom*, 867 F. Supp. at 219. This tension does not exist in FAAAA cases. The FAAAA is not limited by any Congressional enactment like the ADA savings clause, which provides that "[a] remedy under this part is in addition to any other remedies provided by law." 49 U.S.C. § 40120(c). In the absence of any indication of Congressional intent to preserve state-law tort claims from preemption under § 14501(c)(1), the only basis for limiting preemption is the statute itself. The courts in both *Rombom* and *Smith v.*

Comair ultimately based their decisions on the statutory preemption language, and recognized that the core question in these cases is whether the conduct alleged to give rise to liability is sufficiently "related to," or conversely, "unnecessary to" the defendant's services.

Was the conduct of Dan's City that Mr. Pelkey claims is actionable necessary to the provision of its services? New Hampshire law required Dan's City to file a report with the state DMV after it had held Mr. Pelkey's vehicle for more than 30 days, including necessary information about the vehicle. N.H. Rev. Stat. Ann. § 262:2(III). Despite any disagreement about whether the information in the report was all true, or reasonably believed to be so by Dan's City, filing of the form was required by law.

Was Dan's City's conduct in disposing of the vehicle reasonably necessary to the provision of its services? If tow trucking companies cannot provide notice of sale as dictated by state abandoned motor vehicle laws, and dispose of vehicles that remain unclaimed, how are they to be paid for towing and storing such vehicles? Would any rational provider of services such as tow trucking agree that obtaining payment for services rendered is not a necessary part of what they do?

All of the alleged wrongful conduct of Dan's City was part of the state sanctioned and regulated process for disposing of abandoned vehicles under Ch. 262. Mr. Pelkey may claim that Dan's City had a duty to suspend the process and negotiate the fees with him when it learned about the unfortunate reasons for his delay in claiming the vehicle, but these claims do not take them outside the realm of those activities that constitute the ordinary conduct

of towing companies in obtaining payment for towing and storage.

In any event, Mr. Pelkey alleges no outrageous conduct, unnecessary to Dan's City's services as a tow trucker, as alleged in *Rombom* or *Smith v. Comair*. He has not alleged any wanton, malicious or intentionally injurious conduct divorced from the regular, legitimate business activity of a tow truck company. The undisputed facts reflect nothing more than a garden variety dispute over payment of past due towing and storage charges, complicated by the fact that the vehicle owner was hospitalized for a long time after the tow, and did not receive notice of the tow from his landlord, or from Dan's City because its mail notice was undeliverable to Mr. Pelkey's address. Failure to suspend the sale and disposition process in the absence of any tender of payment, especially after Mr. Pelkey disputed any obligation to pay storage charges weeks after the failed auction, is hardly outrageous in any objective sense, although Mr. Pelkey certainly might subjectively feel otherwise due to his circumstances. Even if the *Rombom* outrageous conduct unrelated to service standard were applicable in this FAAAA case, Mr. Pelkey's claims would fall far short of the mark.

II. MR. PELKEY'S CLAIMS RELATE TO THE SERVICES OF DAN'S CITY "WITH RESPECT TO TRANSPORTATION."

The New Hampshire Supreme Court concluded that Mr. Pelkey's claims are not preempted because they are not made "with respect to transportation." Pet. App. 10-15. The court accepted the argument that Mr. Pelkey's claims are directed solely at Dan's City's conduct distinct from actually moving the vehicle from one place to another, and are therefore outside the scope of what Congress intended to preempt. The court's analysis should be rejected because it overlooks the broad statutory definition of the term "transportation."

"Transportation" is defined in 49 U.S.C. § 13102 (23)(2007 & Supp. 2012), and controls here. The definition includes many activities distinct from the actual movement of persons or property, including "services related to [the] movement [of property], including arranging for, receipt, delivery, . . . storage, handling, and interchange of . . . property." In *Ace Auto Body & Towing v. City Of New York*, 171 F.3d 765 (2nd Cir. 1999), the Second Circuit rejected a narrow dictionary definition of "transportation," like the one applied by the New Hampshire Supreme Court. It held that the broad statutory definition controls the preemption issue. *Id.* at 771.

There is no need to go beyond the language of § 13102 (23) in this case. Mr. Pelkey's claims seek to impose liability on Dan's City for failing to return the vehicle to him when he notified Dan's City of his claim to ownership, instead of taking steps to dispose

of the vehicle for payment of the unpaid towing and storage charges. These claims seek to establish liability under state-law for Dan's City's alleged breaches of duty with respect to the "arrangements for," "receipt," "delivery," "storage," "handling," and "interchange of" the vehicle it towed and stored.

In *PNH Corp v. Hullquist Corp.*, 843 F. 2d 586, 590 (1st Cir. 1988), a case under the Carmack Amendment to the Interstate Commerce Act, which contains a definition of transportation virtually identical to that in § 13102 (23),[22] the court recognized "this broad definition of transportation" to cover a defendant that had stored goods bound for delivery but never actually transported those goods. The court found the term broad enough to cover "all of a motor carrier's services incident to carriage and delivery." *Id.* Directed as they are at the alleged breach of duties by Dan's City in how his vehicle was handled and not returned to him after substantial towing and storage charges were incurred, Mr. Pelkey's claims relate to the transportation of his property as defined broadly by federal law.

The New Hampshire Supreme Court's analysis would limit the scope of FAAAA preemption to claims arising out of the *actual movement* of property, as distinct from all of the wide variety of activities that relate to the actual movement, as

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[22] The Carmack Amendment definition of "transportation," 49 U.S.C. § 10102(9), presently reads that "transportation includes, among other things, services related to [the] movement] [of passengers or property], including receipt, delivery, . . . storage, handling, and interchange of passengers or property."

described in § 13102(23). This narrow interpretation of the law is obviously flawed, as this Court has previously ruled in *Morales* that state-law claims directed at activities preceding the actual delivery of air transportation services (advertising) can be preempted. Moreover, lower courts have had no difficulty concluding that claims directed at activities occurring after the actual delivery of property, such as billing, are preempted. *Data Manufacturing*, 557 F.3d at 852. The Seventh Circuit has reached the same conclusion when dealing with tort claims directed at activities that take place far removed from the actual transportation of goods, such as fraudulent and criminal conduct leading to overpayment for transportation services. *S.C. Johnson & Son*, 697 F. 3d at 547 (describing bribery and kickback scheme of plaintiff's rogue employee resulting in wrongful charges for transportation services to plaintiff company).

III. THE NEW HAMPSHIRE SUPREME COURT'S APPEAL TO EQUITABLE PRINCIPLES TO AVOID THE OPERATION OF CLEAR FEDERAL LAW MUST BE REVERSED.

Although it does not contain an explicit appeal to equity, the New Hampshire Supreme Court's decision is premised in part on the equitable notion that the preemption of Mr. Pelkey's claims under the FAAAA would leave him without a damages remedy against Dan's City. Pet. App. 20-22. The court, relying largely on distinguishable decisions involving personal injury claims under the ADA, concluded

that the FAAAA should be construed narrowly to avoid what it considered the inequity of leaving him without a private tort remedy for damages. Neither this Court's decisions, nor the lower court decisions relied upon by the New Hampshire Supreme Court hold that the FAAAA's preemption rule must yield or be compromised to avoid displacing state tort remedies.

Wolens found preemption of the plaintiffs' consumer protection act claims in that case, which were limited to monetary relief and did not limit the preemptive scope of the statute based on the loss of that private damages remedy. *Wolens*, 513 U.S. at 225, n.3. Similarly, the Court in *Morales* recognized that finding preemption in those cases would not give airlines "*carte blanche* to lie and deceive consumers," given the jurisdiction retained by the DOT to regulate the type of activities involved, and the fact that certain state laws "may affect [airline fares] in too tenuous, remote or peripheral a manner" to have preemptive effect. *Morales*, 504 U.S. at 390. The *Morales* court used as examples of such laws those regulating gambling and prostitution.

These decisions do not recognize an equitable exception to the FAAAA's preemptive scope based on the notion that Congress could not have intended to deprive consumers of a damages remedy under state tort or consumer protection laws. In *Wolens*, the court found preemption of such a state consumer protection act claim for damages was precisely what Congress intended under the ADA, *because* the preempted claims in that case were directed at the price and services of air carriers and their marketing programs. 513 U.S. at 226. *Morales* and *Wolens* teach that preemption of state-law tort or consumer

protection act claims depends in any given case on the nature of the conduct alleged to give rise to liability. *Travel All Over the World*, 73 F.3d at 1433 ("*Morales* does not permit us to develop broad rules concerning whether certain types of common law claims are preempted . . . Instead, we must examine the underlying facts in each case to determine whether the particular claims at issue 'relate to' airline rates, routes, or services.").

Under the FAAAA, if the necessary relationship is present between the state tort claims alleged by the plaintiff and the price, route, or services with respect to transportation, the claim is preempted. The only exceptions are those outlined in the statute, none of which apply in this case.

The New Hampshire Supreme Court's reliance on the Court's decision in *Silkwood v. Kerr-McGee*, 464 U.S. 238 (1984), which dealt with a question of implied preemption under the Atomic Energy Act, of punitive damages claims for personal injury arising from the plaintiff's contamination through employment at a nuclear power plant, is misplaced. That decision involved the complex interplay between state and federal law pertaining to regulation of nuclear power plants, not a statute expressly preempting state-law claims like the FAAAA. Moreover, the decision relied in large part on legislative history finding express Congressional intent to preserve state tort remedies. *Id.* at 251-252. In short, neither *Silkwood* nor any other decision of this Court permits an express preemption statute like the FAAAA to be limited in scope by the absence of a federal damages remedy.

Nor do the decisions involving personal injury tort claims under the ADA support the New

Hampshire Supreme Court's narrow view of preemption under the FAAAA. Personal injury tort cases against airlines have always presented a special set of concerns due to the safety implications of air travel. The Court in *Wolens* noted the significance of statutorily mandated liability insurance coverage as evidence that Congress did not intend to preempt state tort personal injury claims against airlines. 513 U.S. at 231, n. 7.[23] In addition to the Congressional mandate of liability insurance coverage, courts have pointed to the traditional authority of states to regulate public health and safety, which is preserved expressly by the "savings clause" of the ADA, as another reason to doubt that Congress intended the ADA to preempt safety-related tort personal injury claims. *See, e.g.*, *Margolis v. United Airlines*, 811 F. Supp. 318, 323 (E.D. Mich. 1993); *Rombom* 867 F. Supp. at 219 ("Courts faced with preemption challenges to state-laws affecting air carriers must balance the tension between [the ADA preemption statute] and [the savings clause in Section 1506]."). The fact that Congress said nothing about preemption of safety-related claims in the ADA has also led courts to conclude that no preemption of such claims was intended. *Dudley v. Bus. Express, Inc.*, 882 F. Supp. 199, 206 (D. N.H. 1994).

This case raises none of the special concerns that have led the courts to hold that safety-related

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[23] The *Wolens* Court also took note of the position of the United States as *amicus curiae* that it is unlikely that the ADA preempts safety-related personal injury tort claims. 513 U.S. at 231, n. 7.

personal injury tort claims against air carriers are not preempted under the ADA. First, there are no safety related issues in this case, which involves allegations of purely economic harm. More importantly, the FAAAA, unlike the ADA, contains no general savings clause for common law remedies existing at the time of its enactment. Instead it mandates a broad rule of preemption, while specifically reserving to the states "safety regulatory authority. . . with respect to motor vehicles," as well as other aspects of motor carrier regulation, such as financial responsibility. 49 U.S.C. § 14501(c)(2)(A). These important differences between the ADA and the FAAAA, as well as the fact that this case raises no safety-related personal injury claims, eliminate any valid reason to rely on ADA personal injury cases as persuasive authority for the FAAAA's preemptive scope, as it applies in this case.

Moreover, every preemption case involves a conflict between a claim of right under federal law and a claim of right under state-law. *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 584 (1981). A finding that federal law preempts state-law will almost always leave the state-law violation unredressed. *Id.*; *See also Smith v. Dunham-Bush, Inc.*, 959 F.2d 6, 11 (2d Cir. 1992)(preclusion of remedy does not bar the operation of preemption under ERISA).

In *Wolens*, the ADA was held to preempt consumer protection act claims related to airfares, despite the general ADA savings clause, and the fact that the only federal remedy available to the plaintiffs was administrative relief through the DOT. 513 U.S. 228, n. 5. Given the holding in *Wolens*, the scope of preemption under the FAAAA,

unencumbered by any general savings clause, and limited only by specific exemptions enacted by Congress, cannot be limited because a plaintiff such as Mr. Pelkey is barred from recovering damages in tort from the motor carrier that towed the vehicle.

Finally, to the extent this question is relevant to the scope of preemption of state tort claims, preemption in a case like this does not leave consumers without a remedy. In Mr. Pelkey's case, he retains a claim for damages against the party that the legislative history of the FAAAA suggests he should turn: the party that ordered the towing of the vehicle, here, Colonial.[24] The New Hampshire Supreme Court also failed to take into account other state laws that provided Mr. Pelkey the right to report his vehicle to the police as stolen or converted, which could have triggered the DMV to suspend its registration until any dispute with Dan's City was resolved. N.H. Rev. Stat. Ann. § 262:2.[25] Even in the absence of a complaint of conversion or theft, Chapter 262 violations are punishable as motor

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[24] 49 U.S.C. § 14501(c)(5) was added to the FAAAA in 2005 to permit states to regulate non-consensual towing of vehicles from private property by requiring written authorization from the property owner or requiring that the property owner be present before a vehicle may be towed. Although New Hampshire has not done so, states are free enact laws permitted by § 14501(c)(5) to impose greater responsibility on property owners with regard to the non-consensual towing of vehicles from their property.

[25] This is that same statutory provision that requires a towing and storage company to report an abandoned vehicle to DMV if it is unclaimed for more than 30 days. N.H. Rev. Stat. Ann. § 262:2(III).

vehicle law violations for first offenses, and crimes for repeated offenses. N.H. Rev. Stat. Ann. § 262:41. Any person who "with fraudulent intent" conceals any material fact in connection with an application for a certificate of title is guilty of a felony. N.H. Rev. Stat. Ann. § 262:1(I)(d). New Hampshire's comprehensive regulatory scheme thus provides significant protection for the public, including individuals like Mr. Pelkey.

Given these extensive protections that exist in New Hampshire law to protect the public against the unscrupulous conduct of parties that handle vehicles towed without their owners' consent, there is no justification for construing the FAAAA preemption statute narrowly to make sure an aggrieved person has resort to a private damages remedy. *Wolens*, 513 U.S. at 228, n. 4 (existing DOT authority to investigate unfair and deceptive practices and unfair methods of competition counsels against allowing state consumer protection act claim to avoid ADA preemption). Congress has specifically permitted states to regulate this kind of wrongful conduct through motor vehicle laws and criminal laws, to the extent those laws are based on the states' safety regulatory authority. 49 U.S.C. § 14501(c)(2)(A). As private tort or consumer protection act claims have no relation to public safety, but instead involve the application of the state's *economic* authority over motor vehicles, they cannot stand under the safety regulatory exemption, or otherwise under the general rule of preemption. *See City of Columbus*, 536 U.S. at 439 (Congress' clear purpose in § 14501(c)(2)(A) is to ensure its preemption of States' economic authority over motor carriers).

Thus, to the extent the New Hampshire Supreme Court's decision was predicated on the false premise that preemption of the state-law claims in this case would create a remedial vacuum that does not exist, it cannot be sustained.

CONCLUSION

The judgment of the New Hampshire Supreme Court should be reversed.

Respectfully submitted,

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JANUARY 22, 2013

STATUTORY APPENDIX

FEDERAL STATUTES

United States Code

49 U.S.C. § 13102 Definitions

In this part, the following definitions apply:

(23) Transportation.—The term "transportation" includes—
(A) a motor vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, regardless of ownership or an agreement concerning use; and
(B) services related to that movement, including arranging for, receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, packing, unpacking, and interchange of passengers and property.

49 U.S.C. § 14501. Federal authority over intrastate transportation

.....

(c) Motor Carriers of Property

(1) General rule – Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States

may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b) (4)) or any motor private carrier, broker, or freight forwarder wit respect to the transportation of property.

(2) Matters not covered – Paragraph (1) –

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

(B) does not apply to the intrastate transportation of household goods; and

(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

(3) State standard transportation practices

(A) Continuation – Paragraph (1) shall not affect any authority of a State, political subdivision of a State, or political authority of 2 or more States to enact or enforce a law, regulation, or other provision, with respect to the intrastate transportation of property by motor carriers, related to –

(i) uniform cargo liability rules,

(ii) uniform bills of lading or receipts for property being transported,

(iii) uniform cargo credit rules,

(iv) antitrust immunity for joint line rates or routes, classifications, mileage guides, and pooling, or

(v) antitrust immunity for agent–van line operations (as set forth in section 13907),

if such law, regulation, or provision meets the requirements of subparagraph (B).

.....

(5) Limitation on statutory construction – Nothing in this section shall be construed to prevent a State from requiring that, in the case of a motor vehicle to be towed from private property without the consent of the owner or operator of the vehicle, the person towing the vehicle have prior written authorization from the property owner or lessee (or an employee or agent thereof) or that such owner or lessee (or an

employee or agent thereof) be present at the time the vehicle is towed from the property, or both.

NEW HAMPSHIRE REVISED
STATUTES ANNOTATED

TITLE XXI
MOTOR VEHICLES

CHAPTER 259

WORDS AND PHRASES DEFINED

259:4-a Authorized Official.

"Authorized official," for purposes of RSA 262:31 through 40-b, shall mean any police employee of the division of state police, highway enforcement officer or other authorized employee of the department of safety, or peace officer.

CHAPTER 262

ANTITHEFT LAWS, OFFENSES, PENALTIES, HABITUAL OFFENDERS, ARREST OF NONRESIDENTS AND ABANDONED VEHICLES

262:1 Penalties.

I. A person who, with fraudulent intent:

a. Alters, forges or counterfeits a certificate of title or certificate of origin;

b. Alters or forges an assignment of a certificate of title or a certificate of origin, or an assignment or release of a security interest, on a certificate of title or a certificate of origin or a form the director prescribes;

c. Has possession of or uses a certificate of title or certificate of origin knowing it to have been altered, forged or counterfeited; or

d. Uses a false or fictitious name or address, or makes a material false statement, or fails to disclose a security interest, or conceals any other material fact, in an application for a certificate of title or certificate of origin, or in any proof or statement in writing in connection therewith, shall be guilty of a class B felony if a natural person, or guilty of a felony if any other person.

II. A person who:

a. With fraudulent intent, permits another, not entitled thereto, to use or have possession of a certificate of title;

b. Wilfully fails to mail or deliver a certificate of title or application therefor to the department within 20 days after the time required by this title;

c. Wilfully fails to deliver to his transferee a certificate of title within 20 days after the time required by this title; or

d. Wilfully violates any provision of this chapter, except as provided in paragraph I, shall be guilty of a misdemeanor if a natural person, or guilty of a felony if any other person.

262:2 Report of Theft; Recovery of Unclaimed Vehicle.

I. A peace officer who learns of the theft of a vehicle not since recovered, or of the recovery of a vehicle whose theft or conversion he knows or has reason to believe has been reported to the department, shall forthwith report the theft or recovery to the department.

II. An owner or a lienholder may report the theft of a vehicle, or its conversion, if a crime, to the department, but the director may disregard the report of a conversion unless a warrant has been

issued for the arrest of a person charged with the conversion. A person who has so reported the theft or conversion of a vehicle shall, forthwith after learning of its recovery, report the recovery to the department.

III. An operator of a place of business for garaging, repairing, parking or storing vehicles for the public, in which a vehicle remains unclaimed for a period for 30 days, shall within 5 days after the expiration of that period, report the vehicle as unclaimed to the director. A vehicle left by its owner whose name and address are known to the operator or his employee is not considered unclaimed. A person who fails to report a vehicle as unclaimed in accordance with this paragraph forfeits all claims and liens for its garaging, parking or storing and shall be fined not more than $25 for each day his failure to report continues.

IV. The department shall maintain and appropriately index weekly any cumulative public records of stolen, converted, recovered and unclaimed vehicles reported to it pursuant to this section. The director may make and distribute copies of the records so maintained to police officers upon request without fee and to others for the fee, if any, the commissioner prescribes.

V. The director may suspend the registration of a vehicle whose theft or conversion is reported to him pursuant to this section; until the department learns of its recovery or that the report of its theft or conversion was erroneous, it shall not issue a certificate of title for the vehicle.

262:31 Authority to Take.

An authorized official may take a vehicle into his custody and may cause the same to be taken away and stored at some suitable place only as provided in this subdivision.

262:37-a Access to Records.

The custodian of the vehicle may obtain the name and last known mailing address of the last registered owner of a vehicle stored pursuant to this subdivision, and a law enforcement officer with jurisdiction, upon request of the operator of a tow truck, shall give to the tow truck operator, upon receipt of such information, the name and mailing address of the registered owner of the vehicle if the owner or custodian of the vehicle was not present or able to give that information at the scene. If the law enforcement officer is aware that the owner or custodian of the vehicle was removed to a medical or correctional facility, the law enforcement officer shall notify the tow truck operator of that fact.

262:40-a Vehicles Removed From Private and State Property; Conspicuous Notice in Parking Lots and Garages.

I. The owner or person in lawful possession of any private property or the manager of a state-owned park and ride facility on which a vehicle is parked without permission or is apparently abandoned may:

A. Cause the removal of the vehicle in a reasonable manner provided he or she gives notice of such removal to a peace officer as soon as reasonably possible; or

B. Notify a peace officer that he or she wishes to have such a vehicle removed from the property, whereupon the peace officer or another authorized official shall cause the removal of such vehicle pursuant to the removal, impoundment, and notice procedures required by this subdivision.

262:41 General Penalty.

Unless otherwise herein provided, any person convicted of a violation of any provision of this title, or of any rule made under authority thereof, shall be guilty of a violation for the first offense. For any subsequent offense committed during any calendar year he shall be guilty of a violation if a natural person, or guilty of a misdemeanor if any other person.

CHAPTER 358

REGULATION OF BUSINESS PRACTICES FOR CONSUMER PROTECTION

358-A:10 Private Actions.

I. Any person injured by another's use of any method, act or practice declared unlawful under this chapter may bring an action for damages and for such equitable relief, including an injunction, as the court deems necessary and proper. If the court finds for the plaintiff, recovery shall be in the amount of actual damages or $1,000, whichever is greater. If the court finds that the use of the method of competition or the act or practice was a willful or knowing violation of this chapter, it shall award as much as 3 times, but not less than 2 times, such amount. In addition, a prevailing plaintiff shall be awarded the costs of the suit and reasonable attorney's fees, as determined by the court. Any attempted waiver of the right to the damages set forth in this paragraph shall be void and unenforceable. Injunctive relief shall be available to private individuals under this chapter without bond, subject to the discretion of the court.

II. Upon commencement of any action brought under this section, the clerk of the court shall mail a copy of the complaint or other initial pleadings to the attorney general and, upon entry of any judgment or decree in the action, shall mail a copy of such judgment or decree to the attorney general.

CITY OF MANCHESTER,
NEW HAMPSHIRE
CODE OF ORDINANCES

CHAPTER 70

MOTOR VEHICLES AND TRAFFIC

TITLE VII – TRAFFIC CODE

§ 70.40 Towing.

(A) (1) Any company or person which tows a motor vehicle without the consent or authorization of the owner or operator of the motor vehicle shall not charge a towing fee in excess of $70 during regular business hours. The fee for a tow conducted at a time other than regular business hours shall be $85. For purposes of this section, ***REGULAR BUSINESS HOURS*** shall mean, at a minimum, the hours from 8:00 a.m. to 5:00 p.m., Monday through Friday, holidays excepted, as well as any other posted business hours. The company or person shall post the business hours of its storage lot and shall disclose such information upon request of the owner or operator of a motor vehicle.

(2) Any company or person which tows a motor vehicle without the consent or authorization of the owner or operator of the motor vehicle shall not charge a fee in excess of $25 per day for storing the towed motor vehicle. There shall be no storage fee for the first 24 hours after a motor vehicle is towed.

(B) No company or person shall charge any fee other than a towing fee or storage fee, as provided for in § 70.40(A), for a motor vehicle which has been towed without the consent or authorization of the owner or operator; except a company or person may charge a service fee of up to $25 to release a motor vehicle from a storage lot to its owner or operator at a time other than regular business hours. In the event a service fee is charged, the company or person shall have the owner or operator sign an acknowledgment upon the release of the motor vehicle. The acknowledgment shall specify the date and time the vehicle was released, the location of the storage lot, and the amount of the service fee charged. No "hoisting", "let-down", "standby" or "gate" fee shall be charged.

(C) Any company or person which has towed a motor vehicle without the consent of the owner or operator shall release to the owner or operator any and all property contained within or on such vehicle, but not attached to the vehicle, upon request by the owner or operator of the vehicle without requiring the payment of any fee therefore including the towing fee and the storage fee provided for in §70.40(A).

RESPONDENT'S BRIEF

SUPREME COURT, U.S.
FILED
FEB 21 2013
OFFICE OF THE CLERK

No. 12-52

IN THE
Supreme Court of the United States

DAN'S CITY USED CARS, INC. D/B/A DAN'S CITY AUTO BODY,

Petitioner,

v.

ROBERT PELKEY,

Respondent.

On Writ of Certiorari to the
Supreme Court of New Hampshire

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February 2013

QUESTION PRESENTED

Whether 49 U.S.C. § 14501(c)(1), which prohibits states from enacting or enforcing "a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property," preempts negligence and consumer-protection-law claims by a vehicle owner against a towing company that disposed of his vehicle.

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INTRODUCTION

This case presents the question whether federal law provides towing companies in possession of vehicles they have towed free rein to do whatever they choose with those vehicles—sell them, trade them, or keep them for their own private use, even when the vehicle owners have sought their cars' return—or whether state laws may protect vehicle owners' rights to their property and provide remedies to vehicle owners whose cars are sold against their will.

Respondent Robert Pelkey brought state-law claims against petitioner Dan's City Used Cars, a towing company that failed to provide him notice of its plan to auction his car, held an auction to sell the car even after Mr. Pelkey explained that he wanted to arrange for the car's return, represented that it had sold the car at auction when it had not, and eventually traded the car away without compensating him for his loss. Dan's City argues that Mr. Pelkey's claims are preempted by 49 U.S.C. § 14501(c)(1), which prohibits states from enacting or enforcing any "law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." As the New Hampshire Supreme Court held below, however, § 14501(c)(1) does not preempt state laws protecting the property rights of owners of cars in the possession of towing companies. It does not create a regulatory vacuum in which towing companies may convert people's vehicles with impunity.

States and municipalities commonly regulate how towing companies or other entities in possession of towed vehicles can sell or otherwise dispose of those vehicles. These laws provide processes for companies in possession

of abandoned vehicles to gain or transfer ownership in the vehicles, and they protect vehicle owners against having their property sold against their wishes. In this case, Dan's City sought the benefit of state laws that allow custodians of towed vehicles to sell or otherwise dispose of those vehicles under certain circumstances. Yet it seeks to avoid any liability for violating state-law requirements for the sale or disposal of a towed vehicle. If § 14501(c)(1) preempts the enforcement of state laws and duties by vehicle owners whose cars have been sold against their wishes, however, then it also preempts state law processes for transferring title to a towed vehicle.

The process of transferring ownership or otherwise disposing of a car that has been towed is, at best, only tenuously connected to transportation prices, routes, or services. Requiring towing companies to abide by state laws forbidding them from acting deceptively or unreasonably in selling a car in their possession will not significantly affect their towing services. And whether a vehicle owner can be compensated when a towing company sells his car against his will is far removed from Congress's deregulatory goal in enacting § 14501(c)(1). State laws concerning the manner in which a towing company sells or otherwise disposes of a towed car in its possession are not "related to a [motor carrier] price, route, or service . . . with respect to the transportation of property," and the decision below should be affirmed.

STATEMENT OF THE CASE

A. Federal Statutory Background

In 1978, concluding that "maximum reliance on competitive market forces would favor lower airline fares and better airline service," Congress enacted the Airline Deregulation Act (ADA). *Rowe v. N.H. Motor Transport*

Ass'n, 552 U.S. 364, 367 (2008) (internal quotation marks and citation omitted). "To ensure that the States would not undo federal deregulation with regulation of their own, the ADA included a pre-emption provision, prohibiting the States from enforcing any law 'relating to rates, routes, or services' of any air carrier." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378-79 (1992) (citation omitted).

In 1980, Congress similarly deregulated the trucking industry. *See* Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793. Congress did not, at that time, however, expressly preempt state regulation. In 1994, seeking to create a level playing field between air carriers and motor carriers, Congress "sought to pre-empt state trucking regulation." *Rowe*, 552 U.S. at 368. Specifically, Congress included a provision related to motor carriers in a section of the Federal Aviation Administration Authorization Act of 1994 (FAAAA) entitled "preemption of intrastate transportation of property." Pub. L. No. 103-305, § 601(c), 108 Stat. 1606. As currently codified, that provision provides that states "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . or any motor private carrier, broker, or freight forwarder with respect to the transportation of property." 49 U.S.C. § 14501(c)(1).

The conference report accompanying the FAAAA noted that "41 jurisdictions regulate, in varying degrees, intrastate prices, routes and services of motor carriers." *See* H.R. Conf. Rep. 103-677, at 86, *reprinted in* 1994 U.S.C.C.A.N. 1715. "Typical forms of regulation," the report explained, "include entry controls, tariff filing and price regulation, and types of commodities carried." *Id.*; *see also* Statement of President William J. Clinton on

Signing the FAAAA, 30 Weekly Comp. of Pres. Doc. 1703 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1762-1 ("State regulation preempted under this provision takes the form of controls on who can enter the trucking industry within a State, what they can carry and where they can carry it, and whether competitors can sit down and arrange among themselves how much to charge shippers and consumers."). The report did not suggest that Congress was concerned with state regulations concerning the ownership and disposition of towed vehicles. Indeed, the report listed the jurisdictions that did not regulate intrastate prices, routes, and services as Alaska, Arizona, Delaware, the District of Columbia, Florida, Maine, Maryland, New Jersey, Vermont and Wisconsin. At the time of the FAAAA's enactment, all of those states regulated the sale or other disposal of towed or abandoned vehicles, as they continue to do today.[1]

In 1995, Congress added an exemption to the preemption provision stating that it "does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision

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[1]Six of the states allowed liens for towing charges that could be enforced through sale under certain circumstances, or otherwise allowed the sale or transfer of ownership of towed or removed vehicles by the entities in possession of them if certain conditions were met. *See* Alaska Stat. § 28.10.502 (1994); Del. Code Ann. tit. 21 § 6901 (1994); Fla. Stat. Ann. § 713.78 (1994); Me. Rev. Stat. Ann. tit. 29 § 2610 (1994); N.J. Stat. Ann. § 39:4-56.6 (1994); Wis. Stat. Ann. § 779.415 (1994). The other four states allowed a governmental body to sell abandoned vehicles, *see* D.C. Code Ann. § 40-812.2 (1994); Md. Code Ann. Transp. § 25-207 (1994); Vt. Stat. Ann. tit. 24 § 2272 (1994), or to transfer ownership in them to the person in possession of them after that person submitted certain documentation. *See* Ariz. Rev. Stat. § 28-1405 (1994).

relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle." 49 U.S.C. § 14501(c)(2)(C).

B. Factual Background

On February 3, 2007, Dan's City towed Robert Pelkey's 2004 Honda Civic from the parking lot of his apartment complex without his knowledge. JA 9. The car was towed pursuant to the complex's policy that required tenants to move their cars during snowstorms. At the time of the towing, Mr. Pelkey was confined to bed because of a serious medical condition. *Id.* at 9. The car was parked in a designated handicapped-accessible parking spot, displayed a valid and current disability license plate, was properly registered, and displayed a current parking sticker issued by the apartment complex. *Id.* at 7.[2]

Soon after the towing, and before he realized his car was no longer in the parking lot, Mr. Pelkey was admitted to the hospital to have his foot amputated. While at the hospital, he suffered a heart attack, and he was not discharged for almost two months. *Id.* at 9-10.

New Hampshire, like other states, regulates the sale or other disposal of motor vehicles that have been removed from public or private property and are in the possession of a garage or storage company. At the time Mr. Pelkey's

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[2]In its description of the proceedings below, Dan's City notes that various of the facts in the case are disputed. *See, e.g.*, Pet'r Br. 13. On a motion for summary judgment, the evidence and all inferences drawn from it are considered in the light most favorable to the non-moving party—here, Mr. Pelkey. *See, e.g.*, *Bond v. Martineau*, 53 A.3d 608, 611 (N.H. 2012).

car was towed, Chapter 262 of the New Hampshire code provided that if a vehicle that had been removed and stored was unclaimed for 30 days, the custodian of the vehicle could sell or otherwise dispose of the vehicle after giving proper notice of the sale. N.H. Rev. Stat. Ann. §§ 262:36-a, 262:37 (2007) (Pet. App. 34-35). If the last address of the vehicle's owner was known to the garage owner, or could be ascertained through "the exercise of reasonable diligence," the garage owner had to provide the owner notice of the time and place of the sale by registered or certified mail, or in person, at least 14 days before the sale. *Id.* § 262:38 (Pet. App. 35). A vehicle could be disposed of without notice if it was no longer in condition for legal use, upon written notice to and approval from the state department of safety. *Id.* § 262:36-a(III) (Pet. App. 35). The department would approve disposal if, among other reasons, the car's value was under $500, it had major mechanical problems such as a transmission beyond repair, or it was not in condition for legal use on a public way. N.H. Code Admin. R. Saf-C § 1913.02 (2007) (NH App. 36-37).

While Mr. Pelkey was in the hospital, Dan's City filed a "Notice to the Director of Removal" with the New Hampshire Department of Safety, informing the department that it had removed the car and seeking permission to sell the car without notice. Pet. App. 24; NH App. 64. Although Mr. Pelkey's car was fully operational, had fewer than 8,000 miles, and had a Blue Book value of approximately $12,000, Dan's City stated that the car's market value was under $500 and that it was not in condition for legal use on a public way. JA 11. The Department of Safety told Dan's City that it had to provide Mr. Pelkey with notice before sale of the vehicle and provided Mr. Pelkey's address. Pet. App. 24; NH App. 67.

Instead of sending Mr. Pelkey notice that it intended to sell his car or providing the time and place of the sale, however, Dan's City sent him a certified letter stating that it had towed his vehicle and considered it abandoned. Pet. App. 24. Because of Mr. Pelkey's lengthy hospitalization, the letter was returned, with a checked box indicating that Mr. Pelkey had moved and left no address. *Id.* The record contains no evidence that Dan's City made any further effort to find Mr. Pelkey's address or to contact Mr. Pelkey to inform him that it intended to sell his car.

After returning home from the hospital, Mr. Pelkey discovered that his car was not in the apartment complex's parking lot. His lawyer contacted the complex and was told that the car had been towed and was scheduled to be sold two days later. Mr. Pelkey's lawyer faxed a letter to Dan's City to explain that Mr. Pelkey had been in the hospital, that his car was not abandoned, and that he wanted to arrange for the vehicle's return. JA 10.

Despite being told that Mr. Pelkey wanted to arrange for the return of the car, Dan's City went forward with the auction on April 19, 2007. No third party bid on the car, so it remained in Dan's City's possession. Nonetheless, when Mr. Pelkey's lawyer's office made further inquiries, Dan's City represented that the vehicle had been sold. Pet. App. 3; *see also* JA 10 (writ of summons reflecting belief that vehicle had been sold at auction). Dan's City later traded the car to a third party, without providing prior notice to Mr. Pelkey. Mr. Pelkey never received any compensation for the loss of his car. Pet. App. 3.

C. Proceedings Below

Mr. Pelkey filed suit against Dan's City, alleging, as relevant here, that Dan's City engaged in deceptive acts that violated the New Hampshire Consumer Protection

Act and that it breached statutory and common-law duties to Mr. Pelkey, such as the duty to use reasonable care in disposing of the vehicle. JA 12-14.[3] The superior court granted summary judgment to Dan's City on the Consumer Protection Act and negligence claims, holding them preempted by 49 U.S.C. § 14501(c)(1). Pet. App. 23-33. The New Hampshire Supreme Court reversed, holding that "§ 14501(c)(1) does not preempt state laws pertaining to the manner in which a towing company disposes of vehicles in its custody to collect towing and storage charges secured by a lien." *Id.* at 10.

The New Hampshire Supreme Court rested its decision on two grounds. First, the court noted that "the text of § 14501(c)(1) makes clear that preemption does not apply simply because state laws relate to the price, route, or service of a motor carrier *in any capacity*; rather it applies only when state laws relate to the price, route, or service of a motor carrier *with respect to the transportation of property*." *Id.* at 10-11 (emphasis in original). The court concluded that the state laws at issue were not "with respect to the transportation of property." *Id.* at 13-14. "When a towing company seeks to recover the costs incurred from towing and storing a vehicle," it explained, "the manner in which it does so is not incidental to the *movement* of property by a motor carrier." *Id.* at 13.

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[3]Mr. Pelkey also brought claims against Dan's City under the Fair Housing Act, 42 U.S.C. § 3613, and under New Hampshire Rev. Stat. Ann. § 540-A:3. The Superior Court granted summary judgment to Dan's City on the § 540-A:3 claim and dismissed the Fair Housing Act claim on statute of limitations grounds. *See* Sup. Ct. Docket No. 39, NH App. 20, 22. Mr. Pelkey did not appeal the judgment on those claims, and they are not at issue here. Mr. Pelkey also brought various claims against his apartment complex, Colonial Village, that are likewise not at issue here.

"Rather, it is incidental to the rights of property owners to recover their property, and the parallel obligations of the custodians of that property to accommodate the vehicle owners' rights." Pet. App. 13; *see also id.* at 14 ("Those claims have nothing to do with the *transportation* of property; they involve the balance of rights between a lien creditor, who is entitled to recover the value of the debt, and the owner of a towed vehicle, who is entitled to recover either the vehicle after paying the appropriate costs or the remainder of the vehicle's value once the creditor has sold it in accordance with the terms of RSA chapter 262." (emphasis in original)).

Second, the court held that even if Mr. Pelkey's claims rested on state laws "with respect to the transportation of property," they were not sufficiently "related to" a motor carrier's "service" to be preempted under § 14501(c)(1). Pet. App. 16. "Although the ordinary meaning of the phrase 'relating to' is a broad one," the court noted, "it is not so broad as to encompass all possible private civil claims against any motor carrier." *Id.* "The manner in which a towing company may auction another person's property to collect on a debt relates to post-service debt collection—an area of the company's affairs falling well outside its service of towing vehicles." *Id.* at 17. The court noted that Mr. Pelkey's negligence claims bore "only a remote connection to the defendant's 'service,'" and arose not from defendant's towing of the car, but from its disposal of the car. *Id.* at 19. As for the Consumer Protection Act claims, the court noted that they were asserted against Dan's City "based not upon its role as an entity that tows vehicles (or the price, route, or service relating to that role), but upon its role as a custodian of another person's property after the towing has been completed." *Id.* at 19-20. "The state's substantive

requirement to refrain from unfair or deceptive practices in that role," the court continued, "has little to with a towing company's service of removing vehicles from where they are not permitted to be." *Id.* at 20.

In concluding, the court observed that the absence of a federal remedy militated "against reading § 14501(c)(1) so expansively as to encompass everything a towing company might do in the course of its business," and against reading it to cover Mr. Pelkey's claims, which "advance the right of a person whose vehicle has been towed to retrieve it upon payment of the towing and storage costs." Pet. App. 20-21.

Having found that Mr. Pelkey's claims were not preempted because the state laws at issue were not related to a towing company's "service . . . with respect to the transportation of property," the court did not consider 49 U.S.C. § 14501(c)(2)(C), which states that § 14501(c)(1) does not apply to a state's authority to enforce a law "relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle."

SUMMARY OF ARGUMENT

As the New Hampshire Supreme Court correctly held, claims related to the sale or disposal of a towed car in a towing company's possession are not preempted by 49 U.S.C. § 14501(c)(1). Such claims do not involve the enforcement of a state law "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property."

I.A. State-law claims related to the disposal of a towed car are not sufficiently related to motor carrier prices, routes, or services to fall within the scope of § 14501(c)(1).

To begin with, the state laws and duties at issue here do not regulate towing services; they do not reference towing services; and their enforcement will not have a significant impact on the provision of towing services. Further, they do not apply to Dan's City as an entity that tows vehicles, but as an entity in possession of a towed vehicle that it wants to sell. And that Dan's City sought to collect payment for its towing services through its sale or trade of Mr. Pelkey's car does not make Mr. Pelkey's claims sufficiently related to the towing services to be preempted. Not every action a towing company takes to collect on a debt for towing services, no matter how removed from the services themselves, is "related to" those services within the meaning of § 14501(c)(1).

In addition, the sale or trade of a towed vehicle is not itself a motor carrier "service." Whatever other limitations there are on the definition of "services," at the least, to be a service under the statute, the action must be performed for someone else, as part of a bargained-for exchange. Here, Dan's City did not attempt to sell and eventually trade away Mr. Pelkey's car for any customer; it traded away the car for its own benefit.

Moreover, Congress specified in § 14501(c)(1) that it was preempting only the enforcement of state laws related to motor carrier prices, routes, or services "with respect to the transportation of property." In enacting the FAAAA, Congress was concerned with regulation of the transportation of property—that is, with its movement from one place to another. The sale or trade of a car that has been towed is not related to the movement of the vehicle. It is a process distinct from transporting the vehicle, and claims related to that process are not preempted by the FAAAA.

Overall, state-law claims protecting vehicle owners from deceptive and abusive behavior in the disposal of their cars are simply too tenuous, remote, and peripheral to transportation services to be preempted. Likewise, such claims are remote from Congress's purpose, in enacting the FAAAA, of keeping states from substituting their own demands in place of competitive market forces in determining what services a motor carrier provides. The state laws underlying Mr. Pelkey's claims make no demands at all on motor carriers in their capacity as providers of transportation services.

I.B. To the extent it is based on common-law duties, Mr. Pelkey's negligence claim is not preempted for the additional reason that it does not involve enforcement of "a law, regulation, or other provision having the force and effect of law." This Court explained in *Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002), that a preemption provision that preempts enforcement of "a law or regulation" is most naturally read not to encompass common-law claims. For the same reasons, the words "a law [or] regulation" in § 14501(c)(1) do not include the common law, and the addition of the words "or other provision" underscores that the preemption provision applies only to positive state enactments.

II. Dan's City argues that the Court need not consider whether state regulatory schemes governing the disposal of towed vehicles are preempted. Yet Dan's City relies on the New Hampshire regulatory scheme governing disposal of towed cars to argue that vehicle owners are sufficiently protected against the actions of abusive towing companies. And in disposing of Mr. Pelkey's car, Dan's City sought to rely on state laws allowing towing companies to sell or otherwise dispose of towed cars under certain circumstances. But if state-law claims pertaining to the

disposal of towed vehicles are "related to a price, route, or service of any motor carrier. . . with respect to the transportation of property," so, too, is direct state regulation of that subject. If § 14501(c)(1) preempts vehicle owners' enforcement of state laws regarding the disposal of towed vehicles, it also preempts state laws permitting towing companies to dispose of towed vehicles and providing procedures for them do so. And although Dan's City claims state criminal laws will protect vehicle owners, if § 14501(c)(1) preempts enforcement of state civil laws relating to the disposal of a towed car, it preempts enforcement of state criminal laws in the area as well.

States have traditionally regulated in the area of disposal of towed or abandoned vehicles, balancing vehicle owners' interests in the return of their vehicles with towing companies' interests in being able to dispose of vehicles in their possession. Such laws are necessary both for towing companies in possession of abandoned vehicles and for vehicle owners whose cars have been towed: Without laws governing the sale of towed vehicles, towing companies in possession of abandoned vehicles would not know how to sell the vehicles to ensure that the new owners can obtain certificates of title. And if state laws pertaining to the disposal of towed vehicles are preempted, vehicle owners will be left without protection or a remedy if their unabandoned towed cars are sold against their will.

ARGUMENT

Mr. Pelkey's claims against Dan's City do not challenge the towing of his car, the way it was towed, or the price for that tow. Rather, they relate to the manner in which Dan's City attempted to sell and ultimately traded away Mr. Pelkey's car. That is, they concern the way in which Dan's City permanently deprived Mr. Pelkey of his property.

Claims related to the sale or other disposal of a towed vehicle do not involve the enactment or enforcement of "a law, regulation or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." Moreover, consideration of the consequences of holding state laws governing the sale or other disposal of towed vehicles preempted confirms that Congress could not have intended the provision's preemptive force to extend that far.

I. Mr. Pelkey's Claims Are Not Preempted by Section 14501(c)(1).

A. Claims Related to the Sale or Other Disposal of a Vehicle Do Not Involve the Enactment or Enforcement of a Law "Related to a . . . [Motor Carrier] Service . . . With Respect to the Transportation of Property."

Section 14501(c)(1) does not preempt Mr. Pelkey's claims. Although the statutory language is broad, *see Morales*, 504 U.S. at 383, it does not preempt all state laws affecting motor carriers or all state-law claims against a motor carrier. *See, e.g., id.* at 390. Rather, it preempts only enforcement of state laws that are "related to . . . a [motor carrier] price, route, or service" "with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). Here, Mr. Pelkey's claims relate to the manner in which Dan's City attempted to sell and ultimately traded away his car.[4] These claims are not "related to" Dan's City's

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[4]Dan's City notes (at 22) that some of the conduct related to the sale took place before the sale itself, such as Dan's City's failure to make reasonable efforts to identify Mr. Pelkey. But as

(continued...)

towing services. And a towing company's sale or trade of a vehicle is not itself a "service" and does not concern "the transportation of property."

1. Although towing is a motor carrier service involving the transportation of property, Mr. Pelkey's claims are not sufficiently "related to" Dan's City's towing services to be preempted. State enforcement actions "relate to" prices, routes, or services if they have "a connection with or reference to" them. *Morales*, 504 U.S. at 384. In determining whether a state law relates to prices, routes, or services, this Court has looked to whether the law "directly regulate[s]," *Rowe*, 552 U.S. at 372, "express[ly] reference[s]," *Morales*, 504 U.S. at 388, or has a "forbidden significant effect" on them. *Id.*

Although the phrase "related to" is broad, this Court has made clear that it has limits. *See N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (explaining that "relate to" in ERISA cannot extend "to the furthest stretch of its

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[4](...continued)
Dan's City itself recognized in seeking certiorari only on the question of whether claims based on laws "regulating the sale and disposal of a towed vehicle" are preempted, Pet. i, Mr. Pelkey's claims against Dan's City all relate to the disposal of the car. His Consumer Protection Act claim challenges deceptive statements made by Dan's City in seeking permission to sell the car, its failure to follow the proper procedures for disposing of a vehicle, and its failure to cancel an auction when Mr. Pelkey's identity and circumstances were revealed. JA 12. And his negligence claim challenges Dan's City's failure to make reasonable attempts to identify Mr. Pelkey before arranging to sell his car, to take reasonable efforts to return the vehicle instead of selling it, and to use reasonable care in disposing of the vehicle. *Id.* at 13.

indeterminacy" because "then for all practical purposes preemption would never run its course" and "Congress's words of limitation [would be a] mere sham"). "[F]ederal law does not pre-empt state laws that affect rates, routes, or services in 'too tenuous, remote, or peripheral a manner.'" *Rowe*, 552 U.S. at 375 (quoting *Morales*, 504 U.S. at 390). And "the state laws whose 'effect' is 'forbidden' under federal law are those with a '*significant* impact' on carrier rates, routes, or services." *Id.* (quoting *Morales*, 504 U.S. at 388, 390) (emphasis in *Rowe*).

Here, first, the Consumer Protection Act, common-law, and statutory duties on which Mr. Pelkey's claims are based do not regulate towing services. They do not, for example, "require carriers to offer a system of [towing] services that the market does not now provide." *Rowe*, 552 U.S. at 372. They do not "establish binding guidelines" that would effectively give consumers an "enforceable right" to a particular towing service. *Morales*, 504 U.S. at 388. And they do not "freeze into place services that carriers might prefer to discontinue in the future." *Rowe*, 552 U.S. at 372. They place no requirements at all on when, where, why, or how tow truck operators tow vehicles. They relate to the transfer of ownership of another person's vehicle, not to the towing of the vehicle.

Second, the state laws and duties underlying Mr. Pelkey's claims do not expressly reference towing services. The Consumer Protection Act claim and the negligence claim (insofar as it is based on the common-law duties of bailment) involve laws and duties that apply in the conduct of trade or commerce or when a person is the custodian of another person's property, whether a towed vehicle is involved or not. *See, e.g.*, N.H. Rev. Stat. Ann. 358-A:2 (Pet. App. 36) (making it unlawful to use deceptive acts "in the conduct of any trade or commerce"). To the extent the

negligence claim is based on statutory duties under Chapter 262, it involves laws that are less general, governing the disposal of "removed" vehicles, N.H. Rev. Stat. Ann. 262:36-a (Pet. App. 34); nonetheless, the word "removed" is not a reference to the *service* of towing.

Third, enforcing the laws and duties underlying Mr. Pelkey's claims would not have a significant effect on towing services. *See Rowe*, 552 U.S. at 375 ("[T]he state laws whose 'effect' is 'forbidden' under federal law are those with a '*significant* impact' on carrier rates, routes, or services." (quoting *Morales*, 504 U.S. at 388, 390)). Mr. Pelkey's claims are based on a law forbidding companies to use deceptive acts in the conduct of their business, and on statutory and common-law duties requiring reasonable efforts to identify the owner and return the towed vehicle, and to use reasonable care in disposing of the vehicle. Dan's City questions whether towing companies will continue towing vehicles if they can be held liable for violating these laws and duties. Pet'r Br. 37. But there is no evidence to suggest that towing companies do not already comply with such laws and duties in the vast majority of instances. It is difficult to believe that towing companies are so dependent on deceptive acts in regard to selling cars and on forgoing reasonable attempts to return vehicles to owners before selling them that they would discontinue or greatly modify their services rather than comply with these laws and duties. Similarly, it is hard to imagine that companies would stop towing or significantly change their services rather than take simple steps such as providing reasonable notice of their intent to auction a person's vehicle or refraining from trading away a vehicle when the owner has expressed willingness to discuss payment.

2. Dan's City argues that "it defies logic" to suggest that actions connected with selling or trading a vehicle that has been towed are not related to towing services. Pet'r Br. 21. According to Dan's City, the claims are "directed at the normal daily activities of a tow truck operator that comes into possession of a vehicle that appears to be abandoned," and it is "disingenuous" to claim that the activities are not "related to" a towing company's services. *Id.* at 31. However, that a law is applied to a towing company does not itself make the law preempted. Even when they are applied to motor carriers, state laws are not preempted under § 14501(c)(1) if they affect prices, routes, or services in only a "tenuous, remote, or peripheral" manner. *Morales*, 504 U.S. at 390 (citation omitted). The state laws and duties being enforced here relate to ownership of towed vehicles and are too remote from Dan's City's towing services to be preempted.

Indeed, that Dan's City is a motor carrier is irrelevant to the laws invoked here. They do not apply to Dan's City as an entity that tows vehicles. Rather, they apply to tow truck operators only to the extent that the operators are in possession of a removed car and seek to dispose of it, the same way that they would apply to anyone in possession of a towed vehicle who sought to sell it. The sale and disposal provisions of New Hampshire Revised Statutes Chapter 262, for example, discuss disposal by a "storage company," sale by "the custodian of the vehicle," and notice by a "garage owner or keeper." Pet. App. 34-35. Thus, they recognize that the entity disposing of a removed vehicle may not be the tow-truck operator at all.

That an action is undertaken by a company that tows cars—even when it is performed on a towed car—does not mean that claims concerning that action are sufficiently "related" to towing to be preempted. For example, tow

truck operators might operate auto repair shops where they tow cars to be fixed. Here, for instance, petitioner also does business as "Dan's City Auto Body." It would provide an unfair advantage to repair shops that provide towing services and disadvantage consumers in an arena far removed from the goals of the FAAAA if state regulation of mechanics or state-law claims based on negligence by mechanics was preempted as to those shops. Likewise, it would be irrational if mechanics could be held accountable for negligent work on a car if the owner dropped the car off at the mechanic's garage, but could not be held accountable if the car had broken down and been towed to the mechanic. Akin to the actions of a mechanic working on a car towed to his shop, Dan's City's actions in attempting to sell and eventually trading away Mr. Pelkey's car are too attenuated from the towing services to be deemed "related to" those services.

3. Dan's City also contends that Mr. Pelkey's claims are related to towing services because they "relate[] to payment" for those services, and "payment for services is an integral and indispensable element of any service transaction." Pet'r Br. 30, 22. Mr. Pelkey's claims, however, do not challenge Dan's City's right to seek payment for services, its charges, or its billing procedures. Rather, his claims relate to Dan's City's disposal of his car. That trading away the car was the means through which the company sought to collect on the debt for towing does not make claims regarding the trade sufficiently related to the towing services to be preempted. If Dan's City were correct, states would be barred by § 14501(c)(1) from regulating abusive debt collectors if they were collecting on a debt for towing, and a towing company could break into a vehicle owner's house, steal items, and then claim that any state-law action based on the theft was preempted

because it was merely seeking payment for services rendered.

In any event, if the fact that the disposal of a vehicle was the means through which a towing company sought payment for a debt for towing services were sufficient for the claims to "relate to" those services, they would relate far more directly to the *price* of those services, because the payment is the payment *of the price*. Claims related to the price of non-consensual towing, however, are exempt from preemption under 49 U.S.C. § 14501(c)(2)(C), which exempts from preemption the enactment or enforcement of "a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle." Thus, if the fact that Dan's City sold Mr. Pelkey's car to collect on a debt for towing services were sufficient to bring Mr. Pelkey's claims within the scope of § 14501(c)(1), the claims would be exempt from preemption under § 14501(c)(2)(C).

In its petition-stage reply (at 7), Dan's City relied on legislative history to argue that the non-consensual tow exception in § 14501(c)(2)(C) was "clearly intended to exempt only the actual prices charged for nonconsensual towing services from preemption." "Congress's authoritative statement," however, "is the statutory text, not the legislative history," *Chamber of Commerce v. Whiting*, ___ U.S. ___, 131 S.Ct. 1968, 1979 (2011) (citation omitted), and the text of § 14501(c)(2)(C) does not limit the exemption to the enforcement of laws directly regulating the prices of non-consensual tows; the statute exempts from preemption the enforcement of any laws "relating to" the price of non-consensual tows. Under ordinary principles of statutory construction, the words "relating to"

in § 14501(c)(2)(C) should be given the same meaning as the words "related to" in § 14501(c)(1). *See, e.g.*, *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005) ("[It is a] normal rule of statutory interpretation that identical words used in different parts of the same statute are generally presumed to have the same meaning.").[5] Dan's City cannot have it both ways: "Relating to" cannot have a narrow meaning in 49 U.S.C. § 14501(c)(2)(C) while "related to" has a broad meaning in § 14501(c)(1). If Mr. Pelkey's claims are insufficiently related to the price of a non-consensual tow to fall within § 14501(c)(2)(C), they must also be insufficiently related to services to fall within the bounds of preemption under § 14501(c)(1), as their relationship to services is even more attenuated than their relationship to price.

4. Dan's City claims that the challenged activities related to vehicle disposal can themselves be considered "services" within the meaning of § 14501(c)(1) because some courts of appeals have interpreted "services" to include "matters incidental to and distinct from" the point-to-point transportation itself. Pet'r Br. 35. The lower courts dispute whether the word "services" in the FAAAA and ADA is limited to the "the provision of . . .

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[5] "Related to" and "relating to" are used interchangeably in the FAAAA and ADA. The ADA's preemption provision originally applied to laws "relating to" prices, routes, and services, and that was the language interpreted in *Morales*, 504 U.S. at 383. When it reenacted Title 49 in 1994, Congress changed "relating to" to "related to" but "intended the revision to make no substantive change." *Am. Airlines, Inc. v. Wolens*, 513 U.S. 319, 223 n.1 (1995) (citing Pub. L. No. 103-272, § 1(a), 108 Stat. 745). The conference report for the FAAAA explained, in turn, that it was following the recodification language but that it intended "related to" to have the same meaning as "relating to." H.R. Conf. Rep. 103-677, at 83.

transportation to and from various markets at various times," *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1266 (9th Cir. 1998) (en banc), or whether it includes other matters that are "appurtenant and necessarily included with the contract of carriage between the passenger or shipper and the airline," such as "ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself." *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995) (en banc) (citation omitted). But regardless of which view of the scope of "services" is correct, at the least, to be a "service," an action must be part of what the airline or motor carrier is providing to its customer. *See, e.g.*, Black's Law Dictionary (9th ed. 2009) (defining service, in the relevant definitions, as "[t]he act of doing something useful for a person or company, usu. for a fee" and "an intangible commodity in the form of human effort, such as labor, skill, or advice").

Even the courts of appeals that use broader definitions of "service" limit the term to "a bargained-for or anticipated provision of labor from one party to another." *Hodges*, 44 F.3d at 336; *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1258 (11th Cir. 2003) ("[E]ven if 'services,' as used in [the ADA], is construed to encompass aspects of air carrier operations beyond the transportation of passengers . . . its definition is nonetheless still limited to the *bargained-for* aspects of airline operations over which carriers compete."); *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1433 (7th Cir. 1996) (noting, in holding that a travel agency's slander and defamation claims against an airline were not preempted, that "[c]ertainly, [the airline's] false statements regarding [the travel agency's] services were not part of any contractual arrangement that [the airline] had with [the

travel agency] or its clients."). Here, the disposal of Mr. Pelkey's car, despite his desire to have it returned, was not a service Dan's City provided to a customer, let alone one that was "necessarily included with the contract of carriage." *Hodges*, 44 F.3d at 336. Dan's City did not trade away Mr. Pelkey's car for the benefit of a customer; it traded away the car to benefit itself.

The "services" at issue in *Rowe*, 552 U.S. 364, this Court's most recent § 14501(c)(1) case, provide a helpful contrast. There, the Court held that § 14501(c)(1) preempted Maine statutes that regulated procedures for delivering tobacco within the state. Delivery is part of the service that shippers provide. *See id.* at 372 (discussing how the laws at issue would affect what delivery services the shippers "offer" and "provide"). When people hire a company to ship them tobacco, part of what they contract for is the delivery of the tobacco to its destination. *See id.* at 373 (noting that "picking-up, sorting, and carrying goods" are "essential details of the carriage itself"). In contrast, when people hire a company to tow away someone else's vehicle, they contract for the towing, not for the sale or trade of the vehicle, a matter in which they have no interest. Indeed, it is likely that property owners who arrange for tows of other people's vehicles expect that the towed vehicles will eventually be returned to their owners, not that ownership in the vehicle will be transferred to a third party.

5. Section 14501(c)(1)'s limitation of its preemptive scope to the enactment or enforcement of laws related to services "with respect to the transportation of property" underscores that actions related to the disposal of towed cars are not preempted. As Justice Scalia has pointed out, the "with respect to the transportation of property" language "limits the scope of preemption to include only

laws, regulations, and other provisions that single out for special treatment 'motor carriers of property,'" leaving states free to enact or enforce laws "that do not target motor carriers 'with respect to the transportation of property.'" *City of Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424, 449 (2002) (Scalia, J., dissenting); *see also* Pet. App. 10-11 ("The text of § 14501(c)(1) makes clear that preemption does not apply simply because state laws relate to the price, route, or service of a motor carrier *in any capacity*; rather, it applies only when state laws relate to the price, route, or service of a motor carrier *with respect to the transportation of property*.").

Transportation is defined for the purpose of § 14501(c)(1) as a motor vehicle or other equipment "related to the movement of passengers or property" or "services related to that movement, including arranging for, receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, packing, unpacking, and interchange of passengers and property." 49 U.S.C. § 13102(23). Here, Mr. Pelkey's claims are not based on the movement of his property or services related to that movement; they are based on actions surrounding Dan's City's subsequent attempted sale and trade of his car. The sale or trade of a towed vehicle is not a step in transporting that vehicle, but a process that takes place after the transportation process has been completed. Indeed, as noted above, the New Hampshire statute that allows for sale of a towed vehicle discusses sale by "the custodian of the vehicle," N.H. Rev. Stat. Ann. § 262:37 (Pet. App. 35), demonstrating that the state is regulating companies as custodians of vehicles whose movement has ceased, not as motor carriers transporting property. Further, in some states, the state, not the towing company, disposes of a towed vehicle, which again reflects that

transporting vehicles and disposing of towed vehicles are discrete processes. *See, e.g.*, D.C. Code Ann. § 50-2421.10 ("The Department may, consistent with reasonable business practices, sell or otherwise dispose of an unclaimed vehicle.").

Dan's City notes that the services listed in the definition of "transportation" include "arrangement for," "receipt," "delivery," "storage," "handling," and "interchange of" the property, and, focusing particularly on "storage," argues that Mr. Pelkey's claims "seek to establish liability under state-law for Dan's City's alleged breaches of duty with respect to [those services]." Pet'r Br. 44. To begin with, however, those services are not always part of transportation; they are only part of transportation when they are "related to [the] movement" of passengers or property. 49 U.S.C. § 13102(23)(B). Thus, for example, although the temporary storage of a package while it is in transit would be included within the definition of transportation because it is part of the movement of the package from one place to another, the storage of property that has not been moved, or in which the movement has ended, would not be. Here, Dan's City's storage of Mr. Pelkey's vehicle, which took place after the towing was over, was not related to the movement of property.

In any event, Mr. Pelkey claims do not concern Dan's City's storage of his car. His claims are not based on laws that regulate or reference how towed vehicles should be stored, and requiring towing companies to abide by the laws and duties at issue would not significantly impact towing companies' storage practices. Likewise, Mr. Pelkey is not challenging how Dan's City arranged for the tow of his vehicle, or how it delivered, handled, or interchanged his vehicle. He is challenging actions related to how it

disposed of his vehicle, that is, how it purported to extinguish his property rights and transferred his property to someone else. Notably, the list of services in the definition of transportation does not include selling the property or in any way determining its ownership.

In enacting the FAAAA, Congress was concerned with the transportation of property, with its movement from one place to another. Because Mr. Pelkey's claims do not challenge services related to the movement of property, but rather actions related to the nonconsensual sale or trade of his property, they are not preempted.

6. Just as they are remote from Dan's City's towing services, Mr. Pelkey's claims against Dan's City based on the attempted sale and ultimate trade of his car are far removed from the purposes of the FAAAA. *See Travelers*, 514 U.S. at 656 (explaining that because the terms "relate to" and "connection with" are "unhelpful," the Court must "look instead to the objectives of the . . . statute as a guide to the scope of the state law that Congress understood would survive."). In enacting § 14501(c)(1), Congress sought to avoid "a State's direct substitution of its own governmental commands for 'competitive market forces' in determining (to a significant degree) the services that motor carriers will provide." *Rowe*, 552 U.S. at 372. It was concerned not with ownership rights in towed vehicles, but with issues such as "entry controls, tariff filing and price regulation, and types of commodities carried," and with problems such as circumstances "in which rates for shipments within a state exceed rates for comparable distances across state lines" causing "companies frequently [to] ship goods across state lines and back into the state of origin to avoid the higher rates for purely intrastate shipments." H.R. Conf. Rep. 103-677, at 87. Allowing a vehicle owner to seek compensation when a towing

company engages in deceptive or negligent behavior in selling or trading away his car against his will would not reinstate the "antiquated controls" on motor carrier prices, routes, and services that Congress sought to end. *Id.* at 88. It would not keep tow truck operators from "freely compet[ing]" over the provision of their transportation services or replace the free market for such services with governmental demands. In fact, state-law claims related to motor vehicle disposal place no demands on towing at all.

That the claims here are far removed from Congress's goals in enacting the FAAAA is demonstrated by the FAAAA's conference report, which described the types of regulation Congress intended to preempt. The conference report gives no indication that Congress intended to preempt state laws concerning the disposal of towed vehicles. To the contrary, the report lists nine states that did not regulate "intrastate prices, routes and services of motor carriers." *Id.* at 86. At the time the FAAAA was enacted, all of the listed states regulated the sale or other disposal of towed or abandoned vehicles, *see supra* n. 1. Congress's specific consideration of these states thus suggests that Congress did not consider such regulation to be regulation of a motor carrier price, route, or service, and that Congress did not intend to oust such regulation. *But see Rowe*, 552 U.S. at 374.

Moreover, the way towing companies go about disposing of vehicles towed without their owners' consent, and the respect they provide to the owners' private property, is not an area in which "reliance on competitive market forces" would stimulate "efficiency, innovation, and low prices," *id.* at 371, because the owners have no ability to choose among towing companies based on their disposal practices.

In short, as the court below noted, "the manner in which a company in possession of a towed vehicle may dispose of the vehicle to collect on a debt created by operation of state law" is "far removed from Congress's aim of promoting free markets and equalizing the competitive playing field between motor carriers and air carriers." Pet App. 15. Mr. Pelkey's claims are not related to motor carrier services with respect to the transportation of property, and the decision below should be affirmed.

B. Mr. Pelkey's Negligence Claim Based on Common-Law Duties Does Not Involve "a Law, Regulation, or Other Provision."

To the extent that it is based on Dan's City's violation of common-law duties, Mr. Pelkey's negligence claim is not preempted for an additional reason: It does not involve the enactment or enforcement of "a law, regulation, or other provision having the force and effect of law." 49 U.S.C. § 14501(c)(1). *See* Pet'r Br. 26 (acknowledging that, for the preemption provision to apply, a state must be enacting or enforcing "a law, regulation, or other provision").

1. In *Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002), this Court unanimously held that a preemption provision forbidding enforcement of "a law or regulation" did not preempt common-law claims. *Id.* (interpreting 46 U.S.C. § 4306). The Court explained that "the article 'a' before 'law or regulation' implies a discreteness—which is embodied in statutes and regulations—that is not present in the common law." Moreover,"because 'a word is known by the company it keeps,' . . . the terms 'law' and 'regulation' used together in the preemption clause indicate that Congress preempted only positive enactments." *Id.* (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995)). And, it observed, "[i]f 'law' were read

broadly so as to include the common law, it might also be interpreted to include regulations, which would render the express reference to 'regulation' in the preemption clause superfluous." *Id.*

For these same reasons, the words "a law [or] regulation" in § 14501(c)(1) do not include the common law. As in *Sprietsma*, here, the phrase "law, regulation, or other provision," is preceded by the article "a," demonstrating a discreteness not present in common law. As in *Sprietsma*, the doctrine that words are known by the company they keep indicates that "law," like "regulation," includes only discrete, positive enactments (that is, statutes). And as in *Sprietsma*, if "law" were read to include common law, it might also be read to include "regulation[s]" and "other provision[s] having the force and effect of law," rendering those terms superfluous.

Moreover, because the words "a law [or] regulation" in § 14501(c)(1) are followed by "other provision having the force and effect of law," it is even clearer here than it was in *Sprietsma* that "law" and "regulation" do not include common law. In both its everyday and its legal meaning, "provision" refers to a stipulation or specific clause in a law or other legal instrument. *See, e.g.*, *Black's Law Dictionary* (9th ed. 2009) (defining provision as "[a] clause in a statute, contract, or other legal instrument . . . [a] stipulation made beforehand"); *Webster's Third New Int'l Dictionary* 1827 (1981) (defining provision as "a stipulation (as a clause in a statute or contract) made in advance; proviso"). The common-law principles on which Mr. Pelkey relies are not "provision[s]" under the ordinary meaning of that term. Thus, the phrase "other provision having the force and effect of law" does not itself include the common law. And, by referring to "other provision" after "law" and "regulation," the statute reinforces that the

only laws and regulations that are preempted are those that are also contained in "provision[s]"—that is, those that are positively enacted or promulgated, not common-law principles.

2. This Court has never addressed whether common law is "a law, regulation, or other provision" under § 14501(c)(1), nor has it ever held a common-law claim preempted by the FAAAA or ADA. In the only case in which it has considered whether the ADA's or FAAAA's preemption provision applied to a common-law claims, *Wolens*, 513 U.S. 219, the Court held that the ADA does not preempt state-law breach-of-contract claims. *Wolens* focused on whether self-imposed contract terms are "law" under the ADA, rather than on whether the common law is "law." But *Sprietsma*'s subsequent explanation that a preemption provision that preempts enforcement of "a law or regulation" is most naturally read not to encompass common-law claims applies equally here.

3. As this Court explained in *Sprietsma*, it is "perfectly rational for Congress not to pre-empt common-law claims, which—unlike most administrative and legislative regulations—necessarily perform an important remedial role in compensating accident victims." 537 U.S. at 64; *see also, e.g.*, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992) ("[T]here is no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common-law damages actions."). In enacting the FAAAA, Congress was concerned with "state economic regulation" of motor carriers, H.R. Conf. Rep. 103-677, at 87, and with states substituting their own demands for competitive market forces in determining motor carrier prices, routes, or services. *Rowe*, 552 U.S. at 372; *cf. Morales*, 504 U.S. at 378 (noting that the purpose of the ADA's preemption

provision was to "ensure that the States would not undo federal deregulation with regulation of their own"). Congress's focus was on positive state regulation, not on cutting off traditional common-law remedies for wrongful actions.

II. Congress Could Not Have Intended To Preempt State Laws or State-Law Claims Concerning the Sale or Other Disposal of Towed Vehicles.

Consideration of the consequences of preempting state laws concerning the disposal of towed cars confirms that Congress could not have intended § 14501(c)(1) to preempt those laws. Such laws are necessary both to protect vehicle owners and to create processes for towing companies to sell abandoned cars.

A. The federal government does not regulate disposal of towed vehicles. Rather, states protect the rights of vehicles owners in this area, balancing those rights against the interest of towing companies in disposing of unclaimed cars in their possession. States and municipalities regularly regulate the transfer of title or other disposal of towed or abandoned vehicles. *See, e.g., supra* note 1. Moreover, state law governs the issuance of titles to motor vehicle owners more generally, and the transfer of titles between owners of motor vehicles. *See, e.g.*, N.H. Rev. Stat. Ann. Ch. 261 (regulating certificates of title and registrations of vehicles). States need ways to ensure a smooth transfer of title or disposal of vehicles if they are abandoned, and to make sure that vehicle owners are not deprived of property that they have not in fact abandoned. Particularly given the role of states in regulating motor vehicle titles, it is hard to believe that Congress would have intended to leave states with no way to regulate the transfer of title or other disposal of towed vehicles.

Dan's City itself recognizes the importance of state laws governing the disposal of towed vehicles. *See, e.g.*, Pet'r Br. 41 (asking rhetorically what would happen "[i]f tow trucking companies cannot provide notice of sale as dictated by state abandoned motor vehicle laws"). Indeed, it attempts to take shelter in the state's laws governing the matter. *See id.* (asserting that "[a]ll of the alleged wrongful conduct of Dan's City was part of the state sanctioned and regulated process for disposing of abandoned vehicles under Ch. 262"). And it attempts to use the continued existence of the regulatory scheme as a reason why it would not be problematic to preempt state-law claims. *See id.* at 51 ("New Hampshire's comprehensive regulatory scheme thus provides significant protection for the public, including individuals like Mr. Pelkey.").

If the FAAAA preempts state-law claims relating to the disposal of towed vehicles, however, it must also preempt positive state regulation of such disposal. State-law claims challenging the disposal of a towed car could be preempted only if such disposal were deemed "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." And if that were the case, then positive state regulation of the disposal of the car likewise would be preempted. Indeed, if anything, the laws and duties underlying state-law claims, particularly claims based on general duties such as those contained in the New Hampshire Consumer Protection Act and imposed on bailees by the common law, are further removed from the deregulatory goals underlying § 14501(c)(1) than is positive state regulation.

The conclusion that Congress did not intend to create a regulatory gap in the area of disposal of towed vehicles by ousting state law in this area of traditional state

authority is particularly forceful in light of "the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Ours Garage*, 536 U.S. at 432 (citation omitted). This presumption is a "cornerstone" of the Court's preemption jurisprudence, based on "respect for the States as independent sovereigns in our federal system." *Wyeth v. Levine*, 555 U.S. 555, 565 & n.3 (2009) (quotation marks and citation omitted). Dan's City faults the New Hampshire Supreme Court for citing the presumption, claiming it is questionable whether the presumption applies in cases interpreting the scope of express preemption clauses or where the traditional state powers are not about health or safety. Pet'r Br. 31-32. But this Court has regularly cited the presumption against preemption in cases involving the scope of express preemption, *see, e.g.*, *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008), including in cases considering the meaning of "relate to," *see, e.g.*, *Cal. Div. of Labor Standards Enforcement v. Dillingham Const., N.A.*, 519 U.S. 316, 325 (1997), and considering the scope of preemption under the FAAAA. *Ours Garage*, 536 U.S. at 432. Moreover, this Court has applied the presumption in all fields of traditional state regulation, not just those involving health and safety. *See, e.g.*, *Dillingham*, 519 U.S. at 325 (applying presumption in case concerning whether ERISA preempts prevailing wage laws).

B. State regulatory schemes governing the transfer of ownership in towed cars protect vehicle owners from abusive towing companies who would seek to sell the owners' property. Such regulation is not necessary only to protect vehicle owners, but also to protect towing companies in possession of abandoned cars. Because of the role states play in titling motor vehicles, towing companies

and others in possession of abandoned vehicles need state laws so that they can sell those vehicles in a manner that ensures the new owners will be able to obtain certificates of title from the state. *See, e.g.*, N.H. Code Admin. R. Saf-C § 1913.01 (requiring an applicant for title of a car purchased at public auction to submit a "properly executed report of sale or transfer of a non-titled motor vehicle").

Here, even as Dan's City wants a right under state law to sell cars, it also wants to be free from liability when it violates the requirements imposed by state laws relating to the manner in which towing companies dispose of motor vehicles. As the New Hampshire Supreme Court noted, "the defendant has sought the benefit of state law allowing it to claim a lien on a vehicle in its possession, . . . but now seeks to avoid the inconvenience of providing adequate notice and conducting an auction as required by state law." Pet. App. 17. Again, however, Dan's City cannot have it both ways: If state laws related to the disposal of towed vehicles are not preempted to the extent they provide a process for the sale of towed vehicles (and they are not), they are also not preempted to the extent they allow vehicle owners to recover damages when the requirements for sale are violated and the owners suffer pecuniary injury.

C. If claims related to selling or otherwise disposing of a towed car were preempted, then, no matter what state law provided about how long a vehicle must be kept before it could be sold, towing companies could tow cars directly from parking lots to auction lots for immediate sale without compensating the owners. As this Court has explained, however, "[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984);

see Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449 (2005) ("If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly."). Indeed, it is impossible to believe that Congress would have intended to deprive vehicle owners of a remedy under such circumstances.

Dan's City contends that preemption of state-law claims relating to the disposal of towed vehicles would not "open New Hampshire citizens to unfettered abuse by unscrupulous towing companies," because "the criminal law exists to deter conversion and theft of consumer property." Pet'r Br. 22. It notes, for example, that "Chapter 262 violations are punishable as motor vehicle law violations for first offenses, and crimes for repeated offenses." *Id.* at 50-51. Dan's City does not explain, however, why Mr. Pelkey's enforcement of the duties in Chapter 262 related to the disposal of a towed car is, in its view, preempted, but the state's criminal enforcement of those same duties is not. If the enforcement of state civil laws regarding the disposal of towed vehicles is preempted as relating to motor carrier prices, routes, or services with respect to the transportation of property, the enforcement of state criminal laws is as well.

Dan's City argues that Mr. Pelkey was not without a remedy for the improper sale of his property because he had "the right to report his vehicle to the police as stolen or converted, which could have triggered the DMV to suspend its registration until any dispute with Dan's City was resolved." Pet'r Br. 50. But if the laws making it illegal or tortious to sell a towed car are preempted, there would be no basis for the DMV to suspend the registration. In any event, even if the DMV could suspend registration,

that suspension would not ensure that Mr. Pelkey would be compensated for the loss of his property.

Dan's City also contends that even if claims concerning the disposal of towed vehicles were preempted, states could enforce laws regarding disposal if towing companies engaged in outrageous conduct that was unnecessary to their services because such conduct would be too far removed from motor carrier services. Pet'r Br. 23. Whether an action is outrageous and whether it relates to services, however, are not the same inquiry. Moreover, any case claiming wrongful sale of a towed vehicle will involve allegations of unlawful or tortious behavior that some may find outrageous but others may not. Many people, for example, might think it "outrageous" for a towing company in possession of a towed vehicle not to take reasonable steps to inform a car's owner that it plans on auctioning his car; or for the company to proceed with the auction after the owner contacts the company and explains that the reason he has not yet reclaimed the car is that he has been in the hospital and that he wants to arrange for the car's return; or for the company to misrepresent to the owner that the car has been sold at auction when it has not been; or for the company to trade the car away, without notice, and without ever compensating the owner for his loss. And engaging in deceptive or unreasonable behavior in the course of attempting to sell or otherwise disposing of a car is not a "necessary" part of any transportation service.

Finally, Dan's City points out that if claims against towing companies were preempted, vehicle owners would retain a claim against the entity that ordered the vehicle to be towed—here, Colonial Village, Mr. Pelkey's apartment complex. *See* Pet'r Br. 50. But the fact that a towing company has violated its state-law duties does not

necessarily mean that whoever called for the tow violated any of *its* duties. In many cases in which the sale of the vehicle is improper, the towing of the vehicle will have been be perfectly proper, and the vehicle owner will have no claim against the party who arranged for the tow.

That a vehicle owner may have no claim against the property owner that ordered his vehicle towed underscores the difference between claims based on towing services and claims, like those here, based on the sale or trade of a towed car. Mr. Pelkey's claims against Dan's City are not based on whether it was proper for his car to be towed, nor are they based on anything Dan's City did as part of the towing. They are based on Dan's City's violation of duties in the course of attempting to sell and eventually trading away his car. The laws and duties governing the disposal of a towed vehicle are not "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property," and, accordingly, are not preempted by the FAAAA.

CONCLUSION

The decision of the New Hampshire Supreme Court should be affirmed.

Respectfully submitted,

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REPLY BRIEF

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IN THE
Supreme Court of the United States

DAN'S CITY USED CARS, INC. D/B/A
DAN'S CITY AUTO BODY,
Petitioner,
v.
ROBERT PELKEY,
Respondent.

On Writ of Certiorari To The
Supreme Court of New Hampshire

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Brief For Towing And Recovery Association Of America As Amicus Curiae, *Dan's City Used Cars, Inc. d/b/a Dan's City Auto Body v. Robert Pelkey* (No. 12-52) 21

INTRODUCTION

The problem at the heart of this case is how to apply a broadly worded preemption statute to state-law based tort and consumer fraud causes of action in a way that honors the broad deregulatory purpose of 49 U.S.C. § 14501(c)(1), in the context of non-consensual towing, where there is no express contract for services between the parties. At each turn, the statutory language defining the scope of preemption is broad, consistent with the Congressional objective to free motor carriers from state economic regulation, and give motor carriers the same broad freedom from such regulation as that granted to airlines.

The Respondent and several *amici* propose to solve this problem by reading the words "related to" out of the statute, arguing that this language is too "indeterminate" to allow for sensible and predictable rules of decision, or by reading the words "service," "motor carrier," or "transportation" so narrowly that they would not encompass the claims at issue. None of these narrow constructions of the law is persuasive given this Court's existing jurisprudence ascribing broad preemptive scope to the language of § 14501(c)(1). When this language is applied to the claims pled by the Respondent and the conduct Respondent alleges to be actionable under state law, taking into account how tow truckers must deal with abandoned vehicles under New Hampshire law, preemption follows for the same reasons that similar state law claims against motor carriers and air carriers are preempted.

Private damage suits grounded in state tort and consumer protection legislation are a more

indirect, but no less potent form of economic regulation than state regulatory laws imposing the restrictive grasp of economic regulation directly on motor carriers. Both forms of state economic regulation are preempted under 49 U.S.C. § 14501. Congress intended this result, even in cases like this involving non-consensual towing, where the facts would (absent the FAAAA's preemption provision) provide a basis for at least the assertion of a state tort or consumer protection claim. Congress mandated this outcome to promote the greater good - namely, the ability of consumers to take advantage of a competitive, diverse, efficient and cost-effective national motor carrier industry.

ARGUMENT

I. State Common Law Tort Claims Are Within the Intended Scope of 49 U.S.C. § 14501(c)(1).

Mr. Pelkey's argument that § 14501(c)(1) does not preempt his state common law claim has no support in the language of the statute, this Court's other decisions, or the one distinguishable decision he cites.

First, § 14501(c)(1) states that it applies to a "law, regulation, or other provision having the force and effect of law." Mr. Pelkey's interpretation renders the clause "other provision having the force and effect of law" superfluous. He argues that the ordinary and legal definition of the word "provision" is a clause or stipulation in a statute or legal instrument like a contract. Respondent's Br. 29.

But in *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 229 (1995), this Court held that the ADA, which contains with the same "other provision having the force and effect of law" language used in § 14501(c)(1). does not preempt most state law contract claims. *See* 49 U.S.C. § 41713(b)(1). It follows that Congress could not have used the identical clause in § 14501(c)(1) to encompass contracts, given that the FAAAA was intended to have the same preemptive scope as the ADA.

Nor could Congress have intended the words "other provision having the force and effect of law" to mean *only* statutes or regulations, as § 14501(c)(1) already includes the terms "law" and "regulation" within its scope. The only sensible reading of the language as a whole is that Congress included the words "other provision having the force and effect of law" in § 14501(c)(1) to be a catch-all that would encompass any form of state law not otherwise constituting a "law" or "regulation."

Second, this Court's decision in *Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002), interpreting the narrower preemption language in the Federal Boat Safety Act, does not support the position taken by Mr. Pelkey and the United States. That statute does not include the catch-all clause "or other provision having the force and effect of law." Here, in contrast, reading this clause to include the common law gives effect to all of the relevant language in § 14501(c)(1). *Sprietsma* thus works against Respondent's arguments, as it eschews statutory interpretation, like Respondent's, that renders an important part of the statutory language superfluous.

Third, even if state common law is not encompassed within the "other provision . . ." clause in § 14501(c)(1), the word "law" encompasses state common law created through the judicial decision-making process. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47-48 (1987)(the term "state law" in the ERISA preemption provision encompasses state common law tort claims); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 376 (1992)(citing *Pilot Life* as authority for holding that the ADA preempts laws of general applicability like state tort laws); *Cippolone v. Liggett Group, Inc.*, 505 U.S. 504, 522 (1992) (plurality). Following this Court's rulings, lower courts have consistently ruled that state tort claims fall within the basic scope of the ADA and its twin preemption provision in the FAAAA. *Travel All Over The World v. Saudi Arabia*, 73 F.3d 1423, 1435 (7th Cir. 1996)(citing to the "long line of cases that have found various common law claims preempted by the ADA); *Rombom v. United Air Lines, Inc.*, 867 F. Supp. 214, 221 (S.D.N.Y. 1994) (ADA covers state torts claims "related to" airline prices, routes or services).

Fourth, the United States' argument that *Sprietsma* supports a reading of § 14501(c)(1) to exclude common law claims because of a general savings clause in Title 49 is not persuasive. The Federal Boat Safety Act provides that compliance with national standards established under that act "does not relieve a person from liability at common law or under state law." 46 U.S.C. § 4311. Because the scope of preemption under the Boat Safety Act is limited to a state "law or regulation" different from a federal standard, and was enacted with the above-

referenced savings clause,[1] the Court rightly concluded that the savings clause supports a reading of the law to preempt only state statutes and regulations. *Id.* at 63.

In contrast, § 14501(c)(1) was not enacted with a savings clause that expressly limits the preemptive scope of the law. The statute cited by the United States, 49 U.S.C. § 13103, was not enacted as part of the FAAAA in 1994, but is a relic of the pre-FAAAA/no preemption regime.[2] This statute was carried over from prior law as part of the ICC Termination Act of 1995, Pub. L. No. 104-88, § 103, 109 Stat. 803, 856 (1995). The Court in *Morales* rejected a similar argument based on the very similar savings clause at issue there, which it likewise described as "a relic of the pre-ADA/no preemption regime." 504 U.S. at 384. The Court held that such a general savings provision "cannot be allowed to supersede the specific substantive preemption provision." *Id.* The same conclusion follows here, as § 13103 is also a relic of the no preemption era that reads very much like the savings clause at issue in *Morales*.[3]

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[1] Federal Boat Safety Act of 1983, Pub. L. No. 98-89, §§ 4306, 4311(g), 97 Stat. 531, 534 (1983).

[2] This provision had previously been codified at 49 U.S.C. § 10103 prior to the general amendment of Title 49 in 1995 by Pub. L. No. 104-88, 109 Stat. 803 (1995).

[3] The savings clause cited by the United States provides in relevant part that "the remedies provided in this part are in addition to remedies existing under another law or common law." 49 U.S.C. § 13103. The savings clause at issue in *Morales* provided that it preserved "the remedies now existing at common law or by statute." 504 U.S. at 384.

II. Mr. Pelkey's Claims Relate To The Motor Carrier Services Provided By Dan's City With Respect To Transportation.

A. Criteria For Determining Relatedness Under 49 U.S.C. § 14501(c)(1).

Because § 14501(c)(1) and its sister preemption provision in the ADA are so broadly written, state tort and other claims fall within their preemptive scope in a number of different ways. State claims can "relate to" motor carrier "services" if they have any "connection with or reference to" the services. *Morales*, 504 U.S. at 384. In cases involving private damage claims such as Respondent's, the question is whether the plaintiff alleges claims that "relate to" the "services" of the defendant, in the sense that the state law duties the plaintiff seeks to impose via the damages claims amount to state economic regulation of the "operations of" the company. *Wolens*, 513 U.S. at 229, n. 5. It is not necessary that the state law claims even directly impact the services of the defendant. *Morales*, 504 U.S. at 387. Rather, it is enough if the impact is indirect. Nor is it necessary that the claims asserted impact the "essential" services of the defendant, as opposed to those deemed "unessential." *Wolens*, 513 U.S. at 226. And whether or not any of the above criteria are met, it is enough to satisfy the broad "related to" requirement if the state law duties in question, successfully imposed, would have a significant economic effect

upon the services of the defendant. *Morales*, 504 U.S. at 388. Only if none of these criteria are met can the plaintiff's state law claims be considered too "tenuous, remote, or peripheral" to be preempted. *Id.* at 390.[4]

B. Mr. Pelkey's Claims Are Inextricably Intertwined With The Towing Services Provided By Dan's City.

Respondent does not dispute that the towing services provided by Dan's City are "service[s] of a motor carrier . . . with respect to the transportation of property." Resp. Br. 15. Under *Morales* and its progeny, if the claims asserted by Mr. Pelkey are "related to" these motor carrier services, in the sense that they have a direct or indirect connection with, or make a direct or indirect reference to Dan's City's towing services, *or* could have a significant economic impact on Dan's City's towing services, they are preempted.

Mr. Pelkey characterizes his claims as solely "relate[d] to the manner in which Dan's City attempted to sell and ultimately traded away Mr. Pelkey's car," Resp. Br. 13, and "not to Dan's City's towing services." *Id.* at 15. Because it serves their narrow preemption arguments, both Respondent and some *amici* rely on this overly narrow

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[4] In 2008, the Court observed in *Rowe v. New Hampshire Motor Trans. Ass'n*, 552 U.S. 364, 370 (2008), that its prior decision had "settled the meaning" of the ADA preemption provision, and applied this settled meaning to the issues in that case involving preemption under § 14501(c)(1).

characterization of Mr. Pelkey's state law claims, without any meaningful analysis of the pleadings or the state law duties alleged therein to have been breached by Dan's City. This characterization of the claims does not hold up to scrutiny when tested against the actual allegations of the complaint, which describe a series of interrelated events beginning with the towing of Mr. Pelkey's vehicle, and ending with the disposition of the vehicle. J.A. 8-11. Contrary to the Respondent's constricted characterization of his claims against Dan's City for the purposes of this appeal, the complaint alleges breaches of broadly described duties by Dan's City at various times in between the towing and disposition of the vehicle to satisfy unpaid towing and storage charges.

According to the pleadings and facts found to be undisputed by the trial court, the disposition of Mr. Pelkey's vehicle was just the last step in a series of interrelated events that began with the towing. The towing was followed by Dan's City's filing of a mandatory report of abandonment to the NH DMV. *Id.* at ¶14. This, in turn, was followed by Dan's City's attempt to give notice of abandonment to Mr. Pelkey per the instructions of NH DMV, Cert. App. 24, and, finally, by the disposition of the vehicle when Mr. Pelkey refused to pay the fees owed. *Id.* at 25; N.H. App. 86-87.

Mr. Pelkey alleges breaches of duty by Dan's City at each step along the way. The Consumer Protection Act ("CPA") aspect of the complaint, for example, alleges false statements in Dan's City's report of abandonment to the NH DMV, failing to follow unspecified procedures in Chapter 262, and failing to cancel a scheduled auction when the

identity of the owner and the circumstances of the delay in recovering the vehicle were made known to Dan's City. J.A. 11, ¶ 19. The negligence claim asserts breaches of still other alleged state law duties, including a "duty to use reasonable care to ascertain the identity of the owner of [the vehicle] towed from the parking lot," the duty to "use reasonable care in disposing of the automobile," and the "duty to make reasonable efforts to return the vehicle to Mr. Pelkey." *Id.* at 12, ¶ 25. A fair reading of the allegations of the complaint is that all of the alleged breaches of duty by Dan's City are "related to" the towing in the sense that they are part of the same overall transaction or occurrence set out in Mr. Pelkey's complaint. Dan's City is alleged to have breached duties not only in its actual disposition of the vehicle, *but also* through numerous actions *prior to* the disposition of this vehicle that occurred only because the vehicle towed by Dan's City was not timely claimed.

Mr. Pelkey's complaint, which contains the words "towing" or "towed" fifteen times, contradicts his argument on appeal that there is no connection between his claims and the towing of his vehicle. J.A. 6-16. Even as to that aspect of Mr. Pelkey's claims that challenge the disposition of the vehicle, he can't dispute that this occurred due to non-payment of towing (and storage) fees. In that sense, his claims unmistakably involve a dispute over non-payment of towing fees, i.e., non-payment for motor carrier services with respect to transportation. A dispute over payment for motor carrier services is no less "related to" the motor carrier's business than the delivery of the services themselves.

The United States as *amicus* takes a different approach, arguing that § 14501(c)(1) only precludes the use of state law "to regulate the price, route, or service of a company insofar as it operates as a motor carrier." Brief For The United States As Amicus Curiae, at 18. This argument in effect reads the language "related to" out of the statute by asking the wrong question, i.e., is the state law or claim at issue directed specifically at rates, routes or services of a motor carrier? This Court in *Morales*, however, rejected this narrow interpretation of the parallel language in the ADA, 49 U.S.C. § 41713, holding that the law more broadly applies to any state law or claims "related to" price, route or service, not just those that regulate directly the conduct of air carriers. 504 U.S. at 385-86. The United States itself had argued against this narrow interpretation of § 14501(c)(1) in *Rowe*.[5]

State law claims do not have to be focused on the actual movement aspect of transportation to be preempted. *Morales*, 504 U.S. at 385-86 (state regulation of advertising about airfares is pre-empted, even though the preempted conduct precedes the actual delivery of services); *Travel All Over the World*, 73 F.3d at 1432 n. 8 (claims directed at *refusal* of an air carrier to provide services are preempted); *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 335 (5th Cir. 1995) (en banc) (the term "services" in the ADA is broad enough to encompass activities other than actual movement, including

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[5] Brief For The United States As Amicus Curiae, *Rowe* (No. 06-457), at 25 (rejecting argument by the State of Maine because it would read the words "relating to" out of the statute, contrary to *Morales*).

baggage claim and other appurtenant services). If claims directed at advertising for services, and refusal to deliver services (both of which relate to conduct *before* any actual transportation takes place), and loss of baggage (based on conduct *after* the transportation has ended) are preempted, the fact that Mr. Pelkey's claims are directed at conduct occurring after the actual towing of his vehicle does not make them unrelated to, or too tenuously connected to the towing, to be preempted.

The Court must conclude, given the breadth of the "related to" language in § 14501(c)(1), and the settled interpretation of this language by virtue of the Court's prior decisions, that the nexus between the state law duties Mr. Pelkey seeks to enforce, and the conduct of Dan's City alleged to be actionable, is not so "tenuous, remote, or peripheral" as to put these claims beyond the law's preemptive scope.

C. Mr. Pelkey's Consumer Protection Act Claim Seeks To Impose On Motor Carriers Intrusive State Economic Policies Protecting Consumers, Contrary To The Basic Purpose Of The FAAAA's Preemption Provision.

Another reason Mr. Pelkey's CPA claim is preempted is that such claims are always predicated on state imposed economic policies protecting consumers, as distinguished from claims based on obligations arising in a free marketplace. Because such claims by their nature seek to impose intrusive state economic constraints on the conduct of airlines

and motor carriers beyond what the marketplace dictates, they are precisely the sort of "law, regulation, or other provision having the force and effect of law" that Congress sought to preclude with these broad preemption statutes. *Wolens*, 513 U.S. at 227-28.

CPA laws like New Hampshire's are specifically designed to regulate business practices to protect consumers from the rigors of the free marketplace.[6] Here, Mr. Pelkey seeks to use the New Hampshire CPA to impose duties on Dan's City that are predicated on New Hampshire's policies about consumer protection. Enforcement of such duties through a damages action is preempted because "[s]tates may not seek to impose their own public policies or theories of competition or regulation on the operations of air carriers [or motor carriers]." *Id.* at 229, n. 5 (citing Brief For United States As Amicus Curiae).

The prohibited economic impact on motor carriers and air carriers from allowing such claims to avoid preemption is self-evident. Disgruntled customers of these companies unhappy with services rendered will be able to seek enforcement of the state policies embodied in such consumer protection legislation, which dictate standards of business conduct varying from state to state, backed up by the potent economic tool of remedies not otherwise available. These laws are intended to protect consumers by, among other things, imposing liability

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[6] The New Hampshire legislature enacted the CPA in 1970 to ensure an equitable relationship between consumers and persons engaged in business. *Hair Excitement v. L'Oreal U.S.A.*, 965 A.2d 1032.1037 (N.H. 2009).

without proof of causation or actual damages, and by allowing for recovery of exemplary damages and attorney's fees. *See, e.g.*, N.H. Rev. Stat. Ann. § 358:A-10. This is precisely the kind of policy-oriented state economic regulation the FAAAA was intended to prevent. *S.C. Johnson & Son v. Transport Corp. of America*, 697 F.3d 544, 557 (7th Cir. 2012).

D. All Of Mr. Pelkey's Claims Relate To Services Of A "Motor Carrier."

Respondent and the United States as *amicus* argue that Mr. Pelkey's claims are not preempted because they do not "depend on a state law 'related to the . . . service of a *motor carrier*.'" Brief For The United States As Amicus Curiae, at 18. The focus of this analysis is misplaced, as preemption of Mr. Pelkey's claims is not a function of what state law serves as the basis for his claims; it is a function of whether his state law claims (whatever their source) are directed at or related to the services of a "motor carrier." *Morales*, 504 U.S. at 384-85. For the following reasons, the Court must conclude that Dan's City is a "motor carrier."

Although the New Hampshire Supreme Court, relying on this Court's decision in *City of Columbus v. Ours Garage*, 536 U.S. 424, 430-31 (2002), concluded that Dan's City is a "motor carrier," Cert. App. 5, the United States as *amicus* argues otherwise. This argument is premised on the novel theory, apparently not tested by any court, that "motor carrier" status depends on whether the

conduct at issue in a dispute involves the actual physical movement of passengers or property.

The United States points to the statutory definition of "motor carrier" in Title 49, which says that this term "means a person providing motor vehicle transportation for compensation." 49 U.S.C. § 13102(14)(Supp. V 2012). The United States argues that, after the towing was completed, nothing done by Dan's City pertaining to Mr. Pelkey's vehicle involved the provision of transportation for compensation. There are at least two problems with this argument. First, it again overlooks important allegations in Mr. Pelkey's complaint. Second, the definition of "motor carrier" grants persons this statutory status if they are "a person providing motor vehicle transportation for compensation." It does not make that status dependent on whether at any given moment in time that person is actually providing motor vehicle transportation for compensation.

One of Mr. Pelkey's claims is that Dan's City had a "duty to make reasonable efforts to return the vehicle to Mr. Pelkey." J.A. 12, ¶25. In fact his counsel asked Dan's City to tow the vehicle back to his apartment building in May 2007, several months after it had been towed away. N.H. App. 86-87. In the face of this claim that Dan's City breached a legal duty owed to Mr. Pelkey by not returning his vehicle to him, the assertion that the complaint does not pertain to the activities of a motor carrier, as defined in 49 U.S.C. § 13102(14), is not reconcilable with the record.

In any event, the Court should reject the United States' theory because it is not supported by the statutory language. No party disputes that

Dan's City was at all relevant times in the business of providing towing services for compensation. On that basis alone, as recognized by the New Hampshire Supreme Court, Dan's City falls within the statutory definition of "motor carrier." Cert. App. 5. The United States cites no authority for its novel argument that a person or business can be a "motor carrier" one moment while it is actually providing motor vehicle transportation for compensation, and not be a "motor carrier" at other times when actual movement along highways or other physical transportation is not occurring. Its argument is not consistent with the language of the statute, nor with cases interpreting § 13102(14) to grant the status of a "motor carrier" based on factors such as the number of commercial trucks owned by a transportation company, *Executive Transp. v. Louisville Reg. Airport Auth.*, 678 F. Supp. 2d 498, 506 (W.D. Ky. 2009), or the carrier's status as a licensee of the Department of Transportation and operator of commercial motor vehicles. *Vidinliev v. Carey Intern.*, 581 F. Supp. 2d 1281, 1285 (N.D. Ga. 2008).

The Court should reject the argument that Mr. Pelkey's claims are not preempted because Dan's City does not qualify as a "motor carrier."

E. All Of Mr. Pelkey's Claims Relate To Services Of A Motor Carrier "With Respect To Transportation."

Respondent and the United States as *amicus* also argue that Mr. Pelkey's claims are not preempted because they "are not based on a state

law with respect to the transportation of property." Resp. Br. 23-24.[7] This argument depends upon the meaning of the term "transportation," which Respondent and the United States argue should be construed narrowly.

The term "transportation," however, is defined broadly in § 13102(23) of Title 49. The statutory definition is not limiting, and reads:

> The term "transportation" includes –
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> (A) a motor vehicle . . . or equipment . . . related to the movement of passengers or property, or both . . .; and
>
> (B) services related to that movement, including . . . storage, handling, packing, unpacking, and interchange of passengers and property

Arguments for narrow interpretation of this language are at odds with the breadth of the statutory text, as well as the decisional law interpreting its meaning. The leading Court of Appeals decision is *Ace Auto Body & Towing v. City of New York*, 171 F.3d 765 (2d Cir. 1999), which analyzed preemption of New York City towing laws that, among other things, regulated storage and repair facilities. The Court rejected the City's narrow construction of the term "transportation," and concluded that the statutory definition was easily

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[7] The argument of the United States in this regard appears to be limited to Mr. Pelkey's CPA claim. Brief For The United States As Amicus Curiae, at 20-22.

broad enough to cover "services related to the movement of passengers or property," such as "storage and repair." *Id.* at 771.

Mr. Pelkey and the United States as *amicus* argue that the broad statutory definition does not encompass Mr. Pelkey's claims because they do not "concern conduct incidental to the movement of property." Brief For The United States As Amicus Curiae, at 21. This argument ignores the plain text of § 13102(14)(B), which does not use the term "incidental," but defines "transportation" to include "services related to [the movement of property], including . . . storage." As this Court recognized in *Morales*, the words "related to" are very broad, and mean "having a connection with or reference to" something else. 504 U.S. at 384. All of the conduct of Dan's City alleged to be actionable is at least related to the initial towing (i.e. movement of property) in the broad sense dictated by the statutory definition of "transportation."

The property transported by Dan's City was itself a transportation vehicle. Once it was towed, the vehicle had to be stored until claimed by its owner, or if not timely claimed, sold to pay towing and storage fees. Either way, it was being safeguarded in anticipation of further movement of the property. The storage of the vehicle was an intermediate step in the overall transportation process for this involuntarily towed vehicle.

This conclusion is bolstered when taking into account the practical dynamics of the business of non-consensual towing in New Hampshire. The storage provided by Dan's City was part of its ordinary business operations, which include storage of towed vehicles, pending retrieval by the owner, or

handling and disposal of the vehicle as abandoned.[8]

Once in possession of an abandoned vehicle, a tower must comply with laws pertaining to its disposition. N.H. Rev. Stat. Ann. § 262:2(III); N.H. Code Admin. R. Saf-C § 1913.01(a) N.H. App. 35-36 (party in possession of towed vehicle that is not claimed by owner must submit a report to DMV providing information about the towing of the vehicle and the vehicle itself).

The Court must apply the broad statutory definition of "transportation" to the allegedly actionable conduct of Dan's City, taking onto account the nature and scope of Dan's City's business operations pertaining to non-consensual tows. *Morales*, 504 U.S. at 389 (analyzing preemption under the ADA by examining how state law restrictions would affect airlines' businesses given the "dynamics of the air transportation industry."); *Rowe*, 552 U.S. at 364 (2008)(analyzing the dynamics of the motor carrier package delivery industry in assessing the impact of the Maine tobacco delivery law on the ability of that industry to operate and deliver services demanded by the marketplace); *Wolens*, 513 U.S. at 229, n. 5. The claims asserted in the complaint are directed at conduct of Dan's City

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[8] The local Manchester NH towing ordinance recognizes in several ways that storage of towed vehicles is part of the ordinary business operations of towers in that community: (1) it requires towers to post the business hours of the "storage lot" as well as fees for towing and storage; (2) it provides that no more than $25 per day can be charged by a tower for storage of a vehicle it tows without the owner's consent; (3) it imposes limits on any fees that can be charged other than "a towing fee or storage fee." Manchester, NH, Code of Ordinances, ch. 70, § 70.40 (2011). App. 11.

that occurs routinely when it tows a vehicle without owner consent that is not claimed by the owner (e.g. reporting to DMV, giving notice of abandonment, and sale or disposition). The activities triggered by the failure of an owner to timely claim a vehicle are all related factually and legally, in that they are part of a mandatory process dictated by Chapter 262 when a towed vehicle is not claimed.

For all these reasons, the Court should reject the argument that the allegedly actionable conduct of Dan's City does not constitute "transportation" as broadly defined in § 13102(23) to encompass services "related to" the movement of property such as storage.

III. The Presumption Against Preemption Is Not A Sound Basis For A Narrow Construction Of 49 U.S.C. § 14501(c)(1).

No prior decision of this Court relies on any presumption against preemption to interpret narrowly the scope of the broad general rule of preemption under the ADA or FAAAA. Only one of the four decisions of the Court interpreting these laws even references the requirement of a clear statement from Congress before an historic police power of the states can be superseded. *Ours Garage*, 536 U.S. at 433, 438. And that decision does so not to limit the general preemptive scope of the law under § 14501(c)(1), but to bolster the interpretation of the law that allows states to delegate their safety regulatory authority to local governments under 49 U.S.C. § 14501(c)(2)(A). *Id.* at 438-39.

This Court has recognized that the meaning of an express preemption statute cannot be overridden by a presumption against preemption invoked by arguments such as Respondent's assertion that Congress could not have intended to deprive him of any remedy for his alleged damages.[9] The Court rejected just such an argument in *Riegel v. Medtronic, Inc.*, 522 U.S. 312, 326 (2008), explaining that there is no room for speculation about Congressional motives in the face of an unambiguous express preemption statute.

The Court should reject Respondent's argument that "[i]f claims related to selling or otherwise disposing of a towed car were preempted, then, no matter what state law provided about how long a vehicle must be kept before it is sold, towing companies could tow cars directly from parking lots to auction lots for immediate sale without compensating owners." Resp. Br. 34. This hypothetical involves outrageous conduct well beyond the scope of the normal business activities of any tow truck company that may amount to theft. Like gambling and prostitution laws as applied to airlines and motor carriers, theft laws are not

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[9] Resp. Br. 32-33. The Secretary of Transportation or Surface Transportation Board have exclusive jurisdiction to regulate the business practices of tow truck companies if there are grounds to find that such regulation is "necessary . . . to carry out the transportation policy of § 13101." 49 U.S.C. § 13506(b)(1). The fact that the federal authorities with exclusive jurisdiction have not enacted such regulations is not a valid reason to narrow the preemptive scope of § 14501(c)(1). *See Air Transport v. Cuomo*, 520 F.3d 218 (2d Cir. 2008)(state regulation of airline ground delays is preempted where only federal government is authorized to regulate).

preempted by the ADA or FAAAA because they affect airline or motor carrier operations in "too tenuous, remote, or peripheral a manner." *Morales*, 504 U.S. at 390. Since the type of conduct described by Respondent's hypothetical is not necessary to any tow truck company's services, and is therefore only tenuously if at all related to those services, claims directed at such outrageous conduct are not preempted. *Smith v. Comair*, 134 F.3d 254, 259 (4th Cir. 1998).

Moreover, criminal laws prohibiting theft are not the kind of burdensome state economic regulation Congress sought to preempt with the FAAAA. Nor are abandoned vehicle laws such as New Hampshire's Chapter 262 and its regulations, which do not hamper the operations of tow truckers. Instead, they establish procedures for the efficient handling and disposition of abandoned vehicles. Brief For Towing And Recovery Association Of America As Amicus Curiae, at 4. One aspect of the New Hampshire law, requiring notice to vehicle owners of abandonment and sale, N.H. Rev. Stat. Ann. §§ 262:36-a, 262:38, rightly serves to ensure constitutional due process is provided before a vehicle is sold to pay unsatisfied towing charges. *See Fuentes v. Shevin*, 407 U.S. 67 (1972). Such purely non-economic restrictions on motor carrier operations are not preempted under the FAAAA.

The United States' argument that Mr. Pelkey's CPA claim serves the function of "regulating the rights of property owners to recover their property, and the parallel obligations of the custodians of that property to accommodate the vehicle owners rights," Pet. App. 13, is an unconvincing basis to invoke the presumption against preemption. Brief For The

United States As Amicus Curiae, at 21-22 (quoting the New Hampshire Supreme Court decision). This claim seeks to enforce New Hampshire's policy of consumer protection and general fairness in business practices embodied in the CPA statute. This policy is enforced through the damages and other penalties recoverable under that statute. This statutory damages claim has nothing to do with the regulation of state-created property rights, as the United States suggests. *Id.* at 21-22. Property law is undoubtedly a traditional realm of state law, but this claim is not about property law. It is about recovering damages and legal fees from Dan's City for alleged unfair and deceptive business practices.

Mr. Pelkey's highly questionable claim that violations of Chapter 262 by Dan's City also constitute violations of the CPA makes no difference. There is no provision in the New Hampshire CPA or in Chapter 262 that deems a violation of Chapter 262 a violation of the CPA. *See* N.H. Rev. Stat. Ann. § 358-A:2 (defining unfair and deceptive business practices largely by reference to sales of goods).[10] Preemption of Mr. Pelkey's CPA claim no doubt restricts state enforcement of the consumer protection policies embodied in this law, but not any other state law. Since preemption of Mr. Pelkey's CPA claim will not invade any domain traditionally occupied by the states, there is no basis to even invoke any presumption against preemption with respect to that claim.

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[10] The New Hampshire Supreme Court has interpreted the State's CPA as "applicable only to the types of acts therein enumerated." *Simpson v. Young*, 899 A.2d 216, 221(2006).

The significant federal presence in the area of transportation since 1935, well before New Hampshire enacted its CPA in 1970, is another reason that preemption of Mr. Pelkey's CPA claim does not implicate any federalism concerns. Congress enacted the Motor Carriers Act in 1935, to promote economy, efficiency, and safety in the burgeoning motor transportation industry. *See United States v. American Trucking Associations*, 310 U.S. 534, 538-39 (1940). "[A]n assumption of non-preemption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000).

Because § 14501(c)(1)'s rule of preemption applies to tow truckers like Dan's City, state law claims like Mr. Pelkey's implicate the national transportation policy that this law seeks to promote. The statute must be applied in this case based on its language, which this Court has found has a settled meaning, and not on any interpretive presumption grounded in non-existent concerns about respect for a state law that did not exist until 35 years after the federal government assumed a large measure of control over the country's transportation policy.

CONCLUSION

The judgment of the New Hampshire Supreme Court should be reversed.

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEF

Supreme Court, U.S.
FILED
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No. 12-52

In the Supreme Court of the United States

DAN'S CITY USED CARS, INC.,
DBA DAN'S CITY AUTO BODY, PETITIONER

v.

ROBERT PELKEY

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW HAMPSHIRE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

The Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, 108 Stat. 1569, provides, with certain exceptions, that "a State * * * may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier * * * with respect to the transportation of property." 49 U.S.C. 14501(c)(1). The question presented is whether respondent's claims under the New Hampshire Consumer Protection Act and under New Hampshire tort law are preempted by Section 14501(c)(1).

SUMMARY OF ARGUMENT

The Supreme Court of New Hampshire correctly determined that respondent's state-law claims seeking damages for petitioner's allegedly unlawful disposition of respondent's car are not preempted by the FAAAA.

A. When considering a federal statutory provision preempting state law, a court's task is to determine the "domain expressly pre-empted," because by specifying the scope of the statute's preemption, Congress has indicated an intent not to preempt the States' authority outside that scope. *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 541 (2001). The Court has stated that Congress generally must make its preemptive intent "clear and manifest" before it will be found to have preempted state authority in an area of traditional state regulation. *Id.* at 542 (citation omitted). The Court has relied on such a presumption against preemption in construing Section 14501(c)(1). See *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 432-434 (2002).

The FAAAA preempts state law "related to a price, route, or service of any motor carrier * * * with respect to the transportation of property." 49 U.S.C. 14501(c)(1). This Court made clear in *Rowe* v. *New Hampshire Motor Transport Ass'n*, 552 U.S. 364 (2008), that the Act's preemptive scope is broad, superseding any state law having a "connection with, or reference to" the specified subject matters. *Id.* at 370 (citation and emphasis omitted). But while the Act's preemption provision is broad, it is limited by its text to Congress's regulatory objective of eliminating the burden imposed by state regulation on transportation

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verted by the [state] proceedings, is not tantamount to a holding that we are without power to render such a judgment.").

by motor carriers. The statute thus does not preempt state regulation of "price, route, or service" unrelated to motor carriage or to the transportation of property. 49 U.S.C. 14501(c)(1).

B. Respondent's claims under New Hampshire's Consumer Protection Act and common law concern petitioner's allegedly unlawful disposition of respondent's car. Those claims do not relate to the services of a motor carrier or to the transportation of property, and so are not preempted by the FAAAA.

Respondent alleges that petitioner violated the Consumer Protection Act by making deceptive representations when disposing of his car, in violation of the requirements of Chapter 262 of the New Hampshire Revised Statutes. That claim is not based on a state law "related to a price, route, or service of any *motor carrier*," 49 U.S.C. 14501(c)(1) (emphasis added), *i.e.*, "a person providing motor vehicle transportation for compensation," 49 U.S.C. 13102(14) (Supp. V 2011), because petitioner was not acting as a motor carrier when it disposed of respondent's car. Respondent's statutory claim is not preempted for the further reason that petitioner's disposition of respondent's car did not involve "transportation," *i.e.*, "services related to" the "movement of passengers or property." 49 U.S.C. 13102(23). And because the regulation of interests in property is a matter traditionally within the States' regulatory authority, the presumption against preemption also supports the conclusion that the Act does not preempt respondent's state statutory claim.

The FAAAA likewise does not preempt respondent's common-law negligence claim. This Court has held that federal statutes broadly preempting state "requirements" or "standard[s]" encompass state

common law. See *Riegel* v. *Medtronic, Inc.*, 552 U.S. 312, 324 (2008); *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993). By contrast, the Court has determined that a statute more narrowly preempting a state "law or regulation" was "most naturally read as not encompassing common-law claims." *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 63 (2002) (quoting 46 U.S.C. 4306). The Act preempts "a law, regulation, or other provision having the force and effect of law," 49 U.S.C. 14501(c)(1)—language suggesting that Congress's focus here (as in *Sprietsma*) was on positive enactments and other exercises of government regulatory power, not on state common law. That conclusion is buttressed by Congress's enactment of a general saving clause, which preserves "remedies existing under another law or common law." 49 U.S.C. 13103; see *Sprietsma*, 537 U.S. at 63.

The absence of any federal remedy also suggests that Congress did not intend to preempt state-law claims regarding the disposition of vehicles following towing. If state law did not apply, then no law would govern the resolution of disputes arising from a company's disposition of a vehicle the company previously towed, or afford a remedy for wrongful disposition. Not only would that leave vehicle owners without any recourse for damages, it would eliminate the only source of law giving companies the authority to dispose of vehicles when they are unclaimed. That could not have been Congress's intent.

C. Petitioner's arguments in favor of preemption lack merit. Petitioner contends that the FAAAA permits States to regulate motor carriers only if the state law comes within the specified exceptions to the Act's preemption provision. But while such exceptions

identify matters that a state may regulate when it would otherwise be precluded from doing so, the exceptions do not delineate the scope of the preemption provision itself.

Petitioner also argues that its storage and disposition of respondent's car were services within the meaning of Section 14501(c)(1) because petitioner engaged in those activities after it towed respondent's car. In storing and disposing of respondent's car, however, petitioner did not provide a service of a "motor carrier," 49 U.S.C. 14501(c)(1), just as a garage owner does not provide motor-carrier services when it repairs a car it previously towed into its shop. For similar reasons, petitioner errs in contending that respondent's claims involve conduct coming within the broad statutory definition of "transportation." See 49 U.S.C. 13102(23). That definition focuses on "services related to [the] movement" of property, 49 U.S.C. 13102(23)(B), and petitioner's storage and disposition of respondent's car did not involve the movement of property.

Finally, petitioner argues that respondent's claims are preempted because they relate to a dispute over payment for towing, an activity that clearly is a service of a motor carrier. Section 14501(c)(1), however, cannot plausibly be interpreted to preempt state-law remedies related to payment for motor-carrier services. In the typical case, payment disputes would be governed by the state common law of contracts. See *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 228-233 (1995). There is no basis for concluding that Congress intended to eliminate all remedies in the case of non-consensual towing, where payment is not governed by contract, given the absence of a contractual

relationship with the vehicle owner. That is especially so because Congress expressly permitted the States to regulate the "price" of non-consensual towing.

ARGUMENT

RESPONDENT'S STATE-LAW CLAIMS CONCERNING PETITIONER'S DISPOSITION OF RESPONDENT'S VEHICLE ARE NOT PREEMPTED BY SECTION 14501(c)(1)

A. The FAAAA's Preemption Of State Law Is Broad But Does Not Extend Beyond The Terms And Regulatory Purposes Of The Statute

Where Congress has enacted a statutory preemption provision, the Court's "task is to identify the domain expressly pre-empted because 'an express definition of the pre-emptive reach of a statute supports a reasonable inference that Congress did not intend to pre-empt other matters.'" *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 541 (2001) (internal citation and ellipses omitted) (quoting *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 288 (1995)); see *ibid.* ("Congressional purpose is the 'ultimate touchstone' of our inquiry.") (quoting *Cipollone* v. *Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992)). Where "federal law is said to bar state action in [a] fiel[d] of traditional state regulation," the Court works "on the assumption that the historic police powers of the States [a]re not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress." *Id.* at 541-542 (brackets in original) (quoting *California Div. of Labor Standards Enforcement* v. *Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325 (1997)); see *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996) ("[W]e have long presumed that Congress does not cavalierly pre-empt state-law causes of action."). Contrary to petitioner's

contention (Br. 32), that "presumption against the pre-emption of state police power regulations" applies not only to the threshold question of "whether Congress intended any pre-emption at all," but also "to questions concerning the *scope* of its intended invalidation of state law." *Id.* at 485 (quoting *Cipollone*, 505 U.S. at 518); see, *e.g.*, *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 432-434 (2002).[3]

The FAAAA preempts state law "related to a price, route, or service of any motor carrier * * * with respect to the transportation of property." 49 U.S.C. 14501(c)(1). In *Rowe* v. *New Hampshire Motor Transport Ass'n*, 552 U.S. 364 (2008), this Court addressed the scope of preemption under the Act. Based on its prior construction of the ADA's preemption provision, on which the FAAAA's similar provision was based, the Court explained that state laws "'*having a connection with, or reference to*,' carrier 'rates, routes, or services are pre-empted'"; that such state laws are preempted regardless of whether their effect is only indirect, or whether they are consistent with federal regulation; and "that pre-emption occurs at least where state laws have a 'significant impact' related to Congress' deregulatory and pre-emption-related objectives." *Id.* at 370-371 (quoting *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384, 390 (1992)) (citations omitted). By contrast, the Court explained that Section 14501(c)(1) "does not pre-empt state laws that affect" the object of Congress's regula-

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[3] "[A]n 'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States* v. *Locke*, 529 U.S. 89, 108 (2000).

tory focus "in 'too tenuous, remote, or peripheral a manner.'" *Id.* at 375 (quoting *Morales*, 504 U.S. at 390).

The FAAAA thus broadly preempts a state law "related to the price, route, or service" of "motor carriers of property." 49 U.S.C. 14501(c) and (1) (capitalization altered). But the statute is also limited by those terms. The Act does not preempt state laws regulating prices, routes, or services of a company that is not "providing motor vehicle transportation for compensation." 49 U.S.C. 13102(14) (Supp. V 2011) (defining "motor carrier"). For example, it is common for local garages to offer both vehicle-towing and car-repair services. The Act generally precludes a State's regulation of garages insofar as they provide towing services. But the statute does not restrict a State's authority to regulate garages' provision of car-repair services simply because the garages also offer towing services. In addition, Section 14501(c)(1)'s preemption of state laws is limited to laws "with respect to the transportation of property." 49 U.S.C. 14501(c)(1); cf. 49 U.S.C. 14501(a) (preempting state laws relating to transportation of passengers). That clause reinforces the conclusion that Section 14501(c) does not supersede state laws regulating conduct unrelated to the movement of property.

Interpreting Section 14501(c)(1) to preempt state laws regulating a company's conduct unrelated to motor carriage and the transportation of property would be inconsistent with Congress's purpose in enacting the FAAAA: to relieve the burden state regulation had imposed on "transportation by motor carrier[s]." FAAAA § 601(c), 108 Stat. 1606 (capitalization altered); see *id.* § 601(a), 108 Stat. 1605. Such a con-

struction also would be inconsistent with the "assumption that the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress." *Ours Garage*, 536 U.S. at 432 (quoting *Wisconsin Pub. Intervenor* v. *Mortier*, 501 U.S. 597, 605 (1991)).

B. State-Law Remedies For Unlawful Disposition Of A Stored Vehicle Do Not Relate To The Services Of A Motor Carrier Or To The Transportation Of Property, And So Are Not Preempted By SECTION 14501(c)(1)

As relevant here, respondent asserts two claims against petitioner, one under the New Hampshire Consumer Protection Act and the other under New Hampshire tort law. J.A. 12-14. Both claims concern petitioner's disposition of respondent's car. J.A. 13 ("As a result of the deceptive acts of [petitioner], [respondent] was deprived of his automobile."); *ibid.* (petitioner failed "to use reasonable care in disposing of the automobile"). Neither claim is preempted by Section 14501(c)(1).[4]

1. The New Hampshire Consumer Protection Act makes unlawful certain "unfair method[s] of competition" and "deceptive act[s] or practice[s] in the conduct of any trade or commerce," and it creates a private right of action for a person injured by a violation. N.H. Rev. Stat. Ann. § 358-A:2; see *id.* § 358-A:10. Respondent alleges that petitioner violated the Consumer Protection Act by failing to abide by the procedures in Chapter 262 of the New Hampshire Revised Statutes governing the disposition of stored vehicles, and by making false representations to the State to

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[4] The United States takes no position on the merits of respondent's claims under state law, an issue not before this Court.

obtain permission to auction the car without notice to the owner pursuant to a provision of that chapter. J.A. 12.[5] Respondent seeks to recover the value of the car and the personal property it contained, as well as treble damages because, respondent alleges, petitioner's deception was willful. J.A. 12-13; see N.H. Rev. Stat. Ann. § 358-A:10(I) (providing for such damages).

a. Respondent's Consumer Protection Act claims are not preempted because they do not depend on a state law "related to a price, route, or service of any *motor carrier*," 49 U.S.C. 14501(c)(1) (emphasis added). Section 14501(c)(1) precludes the use of a State's consumer protection act to regulate the price, route, or service of a company insofar as it operates as a motor carrier, *i.e.*, "a person providing motor vehicle transportation for compensation." 49 U.S.C. 13102(14) (Supp. V 2011); see *Morales*, 504 U.S. at 383-391 (state consumer protection laws preempted by ADA insofar as they restrict airline fare advertising). But the FAAAA does not prohibit reliance on a State's

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[5] Because respondent's Consumer Protection Act claim and his negligence claim both rely on Chapter 262 to provide the standard of conduct petitioner allegedly breached, petitioner is incorrect in stating that "any discussion of whether the FAAAA preempts Ch. 262 is unnecessary." Pet. Br. 29 n.19; see pp. 22-26, *infra* (discussing respondent's negligence claim); but see Pet. Br. 28-29 (acknowledging that respondent relies on Chapter 262 as the basis for his negligence per se claim). Petitioner contends that "no party challenges the enforcement of the New Hampshire statutory scheme in this case." *Id.* at 23. However, the question petitioner presented, and on which this Court granted certiorari, asks "[w]hether state statutory, common law negligence, and consumer protection act enforcement actions against a tow-motor carrier *based on state law regulating the sale and disposal of a towed vehicle*" are preempted. Pet. i (emphasis added).

consumer protection statute to challenge the validity of the company's other, unrelated services. When the company provides those services it is not "*providing* motor vehicle transportation for compensation," 49 U.S.C. 13102(14) (Supp. V 2011) (emphasis added), and so is not acting as a "motor carrier."

Petitioner tows vehicles from private property, at the property owner's request, when vehicles are parked without the property owner's consent. That is a service of a "motor carrier" within the meaning of the Act, and the State generally may not regulate that service through application of its consumer protection act (or any other law), 49 U.S.C. 15401(c)(1), although it may regulate the price of towing conducted without the prior consent of the car's owner, 49 U.S.C. 14501(c)(2)(C). See also 49 U.S.C. 14501(c)(5) (authorizing States to require prior authorization or presence of private property owner before permitting towing without prior consent of vehicle's owner). Although petitioner provided a motor-carrier service, that service ended after petitioner "deliver[ed]," 49 U.S.C. 13102(23)(B), respondent's car to petitioner's premises. When petitioner subsequently stored respondent's car and then disposed of it in trade, petitioner was no longer engaging in the services of a "motor carrier." See N.H. Rev. Stat. Ann. § 262:36-a (identifying procedures a "storage company" must follow in disposing of a "removed or stored" vehicle); see also Pet. App. 19-20 (concluding that, in disposing of respondent's car, petitioner acted in "its role as a custodian of another person's property after the towing has been completed").

Petitioner's disposal of respondent's car also is not "related to" petitioner's motor-carrier services within

the meaning of the preemption provision. 49 U.S.C. 14501(c)(1). In a literal sense, petitioner's disposal of the car has a "connection with," *Rowe*, 552 U.S. at 370 (emphasis and citation omitted), its prior towing of the vehicle, because petitioner would not have been in possession of respondent's car but for its prior towing of the car, and because a single entity, petitioner, engaged in both activities. But that is the sort of relation that is too "tenuous, remote, or peripheral," *id.* at 375, to significantly implicate Congress's regulatory concerns. Characterizing petitioner's disposal of respondent's car after towing was completed as "related to" its towing would expand federal preemption well beyond Congress's regulatory focus. See *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (declining to interpret "relate to" in preemption provision of the Employee Retirement Income Security Act of 1974 "to extend to the furthest stretch of its indeterminacy"); see Pet. App. 21 (declining to construe Section 14501(c)(1) "so expansively as to encompass everything a towing company might do in the course of its business").

For these reasons, the Consumer Protection Act and Chapter 262 of the New Hampshire Revised Statutes, which, as applied here, regulate the storage and disposal of vehicles after towing is completed, are not preempted by Section 14501(c)(1).

b. Respondent's state statutory claim is not preempted for the similar reason that it is not based on a state law "with respect to the transportation of property." 49 U.S.C. 14501(c)(1). The term "transportation" is broadly defined as "includ[ing]"

> (A) a motor vehicle * * * or equipment of any kind related to the movement of passengers or property, or both, * * * and
>
> (B) services related to that movement, including arranging for, receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, packing, unpacking, and interchange of passengers and property.

49 U.S.C. 13102(23). As the New Hampshire Supreme Court observed, the elements of that definition all describe forms of transportation and activities that "are incidental to the movement of property" (or passengers). Pet. App. 11. Respondent's claim under the Consumer Protection Act does not concern conduct that is incidental to the movement of property. Instead, it concerns petitioner's conduct after the movement of property—petitioner's towing of respondent's car—was completed. See *id.* at 13. Because respondent's statutory claims involve conduct unrelated to the movement of respondent's vehicle, they are not preempted by Section 14501(c)(1).

c. The presumption against preemption provides further support for that conclusion. See *Ours Garage*, 536 U.S. at 432-434, 438 (applying presumption in interpreting Section 14501(c)(1)). The Consumer Protection Act and Chapter 262, as they apply in this case, regulate "the rights of property owners to recover their property, and the parallel obligations of the custodians of that property to accommodate the vehicle owners' rights" while the custodians seek "to recover the costs incurred from towing and storing a vehicle." Pet. App. 13. The regulation of state-created property interests is a "fiel[d] of traditional state regulation." *Lorillard*, 533 U.S. at 541 (quoting

Dillingham Constr., 519 U.S. at 325); see *Barnhill* v. *Johnson*, 503 U.S. 393, 398 (1992) ("In the absence of any controlling federal law, 'property' and 'interests in property' are creatures of state law."). Accordingly, this Court should not deem inoperative state statutes regulating interests in property unless Congress's "clear and manifest purpose" to preempt them can be discerned in the federal statute. *Lorillard*, 533 U.S. at 542 (quoting *Dillingham Constr.*, 519 U.S. at 325); see also *Altria Grp., Inc.* v. *Good*, 555 U.S. 70, 77 (2008). By defining "transportation" to include vehicles "related to the movement of * * * property" and "services related to that movement," 49 U.S.C. 13102(23), Congress did not manifest a clear purpose to preempt state statutes regulating "the rights of property owners to recover their property," Pet. App. 13, after the movement of that property has been completed.

2. In addition to alleging a violation of the Consumer Protection Act, respondent alleges that petitioner was negligent in its disposal of his car, and seeks to recover damages under the State's common law of tort. J.A. 13-14. Respondent's negligence claim is premised on two theories. First, respondent alleges that, by disposing of his car in violation of its statutory obligations under Chapter 262, petitioner's conduct constituted negligence *per se*. J.A. 13; see *Mahan* v. *New Hampshire Dep't of Admin. Servs.*, 693 A.2d 79, 85 (N.H. 1997) ("When an action exists at common law, the negligence *per se* doctrine may define the standard of conduct to which a defendant will be held as that conduct required by a particular statute, either instead of or as an alternative to the reasonable person standard."). Second, respondent claims that peti-

tioner violated its common-law duty as a bailee by failing "to use reasonable care in disposing of the automobile." J.A. 13. These claims also are not preempted by Section 14501(c)(1).

Whether federal law expressly preempts a state common-law damages claim depends on the scope of the preemption provision. See *Chamber of Commerce of the U.S.* v. *Whiting*, 131 S. Ct. 1968, 1977 (2011) ("When a federal law contains an express preemption clause, we 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent.'") (quoting *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993)). In *Sprietsma* v. *Mercury Marine*, 537 U.S. 51 (2002), this Court held that a provision of a federal law preempting "a [state or local] law or regulation" was "most naturally read as not encompassing common-law claims." *Id.* at 63 (quoting 46 U.S.C. 4306) (brackets in original). That was because the provision used "the article 'a' before 'law or regulation' impl[ying] a discreteness—which is embodied in statutes and regulations—that is not present in the common law." *Ibid.* The Court also concluded that "the terms 'law' and 'regulation' used together in the pre-emption clause indicate that Congress pre-empted only positive enactments." *Ibid.*; see *ibid.* ("[A] word is known by the company it keeps.") (quoting *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995)). By contrast, the Court has construed preemption provisions referring more broadly and generically to "requirements" or "standards" to preempt substantive restrictions imposed by state common law as well as by positive enactments. See *Riegel* v. *Medtronic, Inc.*, 552 U.S. 312, 324 (2008) ("Absent other indication, reference to a State's 're-

quirements' includes its common-law duties."); *CSX Transp.*, 507 U.S. at 664 (concluding that "[l]egal duties imposed * * * by the common law" are encompassed by provision authorizing federal regulations that preempt any state "law, rule, regulation, order, or standard") (quoting 45 U.S.C. 434 (1988)).

The preemption provision in the FAAAA, like the one at issue in *Sprietsma*, is limited to positive enactments and other exercises of government regulatory power. That provision applies to "a [state] law, regulation, or other provision having the force and effect of law." 49 U.S.C. 14501(c)(1). By using the article "a," Congress has indicated that it intended the "discreteness" the Court found lacking in the common law. *Sprietsma*, 537 U.S. at 63. Section 14501(c)(1) also eschews the use of broad and generic terms like "requirements" or "standards," instead referring to a "law," "regulation," and "provision," which likewise indicates that Congress was focusing on duties imposed by positive enactments and regulatory powers, not on common-law remedies. 49 U.S.C. 14501(c)(1); see *Sprietsma*, 537 U.S. at 63 ("If 'law' were read broadly so as to include the common law, it might also be interpreted to include regulations, which would render the express reference to 'regulation' in the preemption clause superfluous."); *Black's Law Dictionary* 1345 (9th ed. 2009) (defining "provision" as "[a] clause in a statute, contract, or other legal instrument").

The Court's conclusion in *Sprietsma* that the federal statute did not preempt a state common-law cause of action for damages was "buttresse[d]" by the inclusion of a "saving clause" in the statute providing that compliance with federal law "does not relieve a

person from liability at common law or under State law." 537 U.S. at 63 (quoting 46 U.S.C. 4311(g)). The same consideration applies here. In 1995, Congress abolished the Interstate Commerce Commission, transferring its functions to the Department of Transportation. See ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803. Congress also transferred a general saving clause, see 49 U.S.C. 10103 (1994), making it applicable to federal statutory provisions governing motor carriers, including those enacted the year before in the FAAAA. § 103, 109 Stat. 856 (enacting 49 U.S.C. 13103).[6] The saving clause states that "[e]xcept as otherwise provided in this part, the remedies provided under this part are in addition to remedies existing under another law or common law." 49 U.S.C. 13103. To be sure, "[a] general 'remedies' saving clause cannot be allowed to supersede [a] specific substantive pre-emption provision." *Morales*, 504 U.S. at 385. But Congress's decision to enact such a saving clause can properly guide a court in determining the intended scope of a preemption provision. As in *Sprietsma*, the "saving clause assumes that there are some significant number of common-law liability cases to save [and t]he language of the pre-emption provision permits a narrow reading that excludes common-law actions." 537 U.S. at 63 (brackets in original) (quoting *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 868 (2000)). In light of the saving clause, a "broad reading" of Section

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[6] Petitioner thus is mistaken in asserting that there is "no general 'savings clause' preserving any general state remedies or regulatory authority" that is applicable to this case. Pet. Br. 26; see *id.* at 40-41, 49-50.

14501(c)(1) as encompassing common-law tort actions "cannot be correct." *Geier*, 529 U.S. at 868.[7]

3. As the New Hampshire Supreme Court concluded (Pet. App. 20-22), the absence of any federal remedy for a towing company's unlawful disposition of a vehicle towed without the owner's consent is an additional reason to conclude that Congress did not intend to preempt state-law remedies for that conduct.[8]

In *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, (1995), this Court held that the ADA did not preempt state common-law damages remedies for breach-of-contract claims brought by participants in an airline's frequent-flier program. *Id.* at 228-233. The Court reached that conclusion, in part, because Congress

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[7] Congress's decision to exempt from preemption a State's authority to regulate the "minimum amounts of financial responsibility relating to insurance requirements," 49 U.S.C. 14501(c)(2)(A), is a further indication that Congress did not intend to preempt state common-law tort claims, since the exclusion permits a State to require motor carriers to obtain liability insurance to cover damages resulting from their torts. See, *e.g.*, *Driskell* v. *Empire Fire & Marine Ins. Co.*, 547 S.E. 2d 360, 364 (Ga. Ct. App. 2001) (holding that FAAAA did not preempt state statute and regulations requiring liability insurance); see also 49 U.S.C. 13906(a)(1) (requiring, as a precondition to registration of interstate motor carriers, security sufficient to pay "for each final judgment against the registrant for bodily injury to, or death of, an individual resulting from the negligent operation, maintenance, or use of motor vehicles"); 49 U.S.C. 41112(a) (similar requirement for air carriers).

[8] Petitioner suggests that the New Hampshire Supreme Court created an "equitable exception" (Br. 46) to Section 14501(c)(1). See *id.* at 45-52. That misunderstands the court's discussion, which interpreted the scope of the preemption provision in light of the absence of any available remedy if state law were preempted. See Pet. App. 20-22.

had "indicated no intention to establish * * * a new administrative process for [Department of Transportation] adjudication of private contract disputes." *Id.* at 232. Nor did anything in the statute suggest that Congress "meant to channel into federal courts the business of resolving, pursuant to judicially fashioned federal common law, the range of contract claims relating to airline rates, routes, or services." *Ibid.* Similarly, in *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656 (1954), the Court concluded that the National Labor Relations Act had not preempted state tort actions relating to labor intimidation because "Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct." *Id.* at 663-664; see *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984) ("It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.").

The absence of a federal remedy is not necessarily determinative of the preemption analysis because sometimes "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated," *Arkansas Elec. Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983), with the consequence that no damages can be recovered. But here there is no reason to believe that Congress intended to leave entirely unregulated a towing company's disposition of cars after the towing has ended, and to foreclose any damages remedy.[9] As in *Wolens*, "the

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[9] Congress has created a civil cause of action for loss or damage to property transported by motor carriers engaged in interstate

[Department of Transportation] has neither the authority nor the apparatus required to superintend" disputes about such conduct. 513 U.S. at 232. Construing Section 14501(c)(1) to preempt state-law claims would, "in effect," grant towing companies "immunity from liability" for their unlawful conduct. *United Constr. Workers*, 347 U.S. at 664.

Moreover, because there is no applicable federal law, interpreting the Act to preempt state regulation in this context would also eliminate the only legal authorization for a towing company's disposition of unclaimed cars—authorization on which petitioner relied in seeking to auction and in subsequently trading respondent's car. See Pet. Br. 14-17, 18 n.14, 21-22, 41. As the New Hampshire Supreme Court observed, petitioner "has sought the benefit of state law allowing it to claim a lien on a vehicle in its possession but now seeks to avoid the inconvenience of providing adequate notice and conducting an auction as required by state law." Pet. App. 17 (internal citation omitted).

C. Petitioner's Contrary Arguments Lack Merit

Petitioner variously argues that the FAAAA permits a State to regulate motor carriers only if the state law comes within the specified exceptions to the Act's preemption provision; that petitioner's storage and disposition of respondent's car were "service[s]" covered by that provision and came within the statutory definition of "transportation"; that permitting respondent's state-law claims to proceed would have a

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transportation. 49 U.S.C. 14706(a) and (d); see 49 U.S.C. 13501. But no such remedy exists against motor carriers engaged in intrastate transportation, and the federal remedy Congress created does not cover conduct unrelated to motor carrier services.

significant impact on towing services; and that respondents' claims are preempted because they relate to a dispute over payment for the towing. None of these arguments is persuasive.

1. Petitioner contends that Congress's enactment of specific exceptions to the FAAAA's general preemption provision "is a clear indicator of [Congress's] intent to allow states to regulate motor carriers of property *only* in the areas delineated in these express exceptions." Pet. Br. 24-25 (emphasis added); see *id.* at 24-27. But that argument goes too far: Exceptions to a general rule, while perhaps a helpful interpretive guide, do not in themselves delineate the scope of the rule. The exceptions to the Act's preemption provision do not, for example, affirmatively grant States authority to enact zoning regulations. See 49 U.S.C. 14501(c)(2)(A)-(C), (3) and (5). Under petitioner's interpretation, then, the Act would preclude local governments from regulating the physical location of motor-carrier operations. In fact, the FAAAA does not preempt local zoning authority because zoning ordinances generally are not "related to a price, route, or service of any motor carrier." 49 U.S.C. 14501(c)(1); see also *Warth* v. *Seldin*, 422 U.S. 490, 508, n.18 (1975) ("[Z]oning laws * * * are peculiarly within the province of state and local legislative authorities."). While exceptions to a preemption provision identify state laws that would otherwise be superseded by federal law, they do not themselves define the scope of federal preemption.

2. Petitioner argues (Br. 27-36) that respondent's state-law claims are preempted because they relate to a motor carrier's "service" within the meaning of Section 14501(c)(1). See *id.* at 31 (respondent's "claims

were all directed at the normal daily activities of a tow truck operator that comes into possession of a vehicle"). Petitioner fails to consider, however, whether the conduct that forms the basis for respondent's suit—petitioner's disposition of respondent's car—constitutes a "service *of any motor carrier*," 49 U.S.C. 14501(c)(1) (emphasis added), within the meaning of the FAAAA. A company acts as a "motor carrier" when it is "providing motor vehicle transportation for compensation." 49 U.S.C. 13102(14) (Supp. V 2011). When a company stores a car after towing it and later disposes of the car, it does not act as a motor carrier, just as a garage that provides car-repair services does not act as a motor carrier when it repairs a car after towing it.

For similar reasons, the state law on which respondent relies does not relate to a service "with respect to the transportation of property." 49 U.S.C. 14501(c)(1). Petitioner suggests (Br. 43-45) that respondent's claims involve conduct coming within the broad statutory definition of "transportation." See 49 U.S.C. 13102(23). Petitioner asserts (without elaboration) that respondent's claims "seek to establish liability" under state law for petitioner's "alleged breaches of duty with respect to the 'arrangements [*sic*] for,' 'receipt,' 'delivery,' 'storage,' 'handling,' and 'interchange of' the vehicle it towed and stored." Pet. Br. 44 (quoting 49 U.S.C. 13102(23)(B)). But petitioner fails to quote the critical qualification appearing before the terms he identifies. The statute defines "transportation" as "services related to [the] movement [of passengers or property], including" the examples noted by petitioner. 49 U.S.C. 13102(23)(B). As the New Hampshire Supreme Court explained, the

activities identified in Section 13102(23)(B) "are incidental to the movement of property." Pet. App. 11. Thus, for example, not just any storage of property qualifies as "transportation," even though "storage" is one of the terms used as an example in the statutory definition. Temporary storage of property while in transit is a service that relates to the movement of property. But property that is stored after delivery is no longer in transit, and such storage does not itself constitute "transportation" within the meaning of the statute. See, *e.g.*, 49 C.F.R. 375.609 (distinguishing between "storage-in-transit" and "permanent storage") (regulation of Federal Motor Carrier Safety Administration).[10]

3. Petitioner contends (Br. 36-38) that respondent's state-law claims are preempted because permitting such claims to proceed would have a significant impact on the services of towing companies. See *Rowe*, 552 U.S. at 370-371 ("[P]re-emption occurs at least where state laws have a 'significant impact' related to Congress' deregulatory and pre-emption-related objectives.") (quoting *Morales*, 504 U.S. at 390). But again, petitioner fails to distinguish between the towing service a company provides as a motor carrier with respect to the transportation of property and the storage service the company provides in a different capacity. Petitioner implies (Br. 37) that towing companies might not offer non-consensual towing services if they could be held liable for failing to

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[10] For that reason, petitioner's reliance (Br. 44) on *PNH Corp.* v. *Hullquist Corp.*, 843 F.2d 586 (1st Cir. 1988), is misplaced. See *id.* at 590-591 ("A motor carrier cannot, under this definition, be absolved from liability merely because a loss occurred while the property was temporarily not in transit.").

abide by state requirements regulating the disposal of unclaimed cars. But that contention is hardly obvious. See *Rowe*, 552 U.S. at 375 (noting that state laws affecting federal regulation "in 'too tenuous, remote, or peripheral a manner'" are not preempted) (quoting *Morales*, 504 U.S. at 390). Indeed, as noted above, petitioner *relied* on state law as furnishing a legal justification for its disposition of respondent's car. Nothing in the FAAAA bars a State from including damages remedies as part of that same body of state law, and there is no reason to believe that doing so has the effect petitioner posits. But should a towing company prefer to avoid any possible risk of liability from storage and disposition of towed cars, it can choose to limit its services to towing cars and leave it to other companies to provide storage services.

4. Finally, petitioner suggests (Br. 30) that its disposition of respondent's car "relates to" its towing because that is how petitioner sought to obtain payment for the motor-carrier services it rendered. See *id.* at 22, 45. This argument necessarily is limited to the proposition that respondent's claims are preempted to the extent those claims involve disputes about petitioner's charges for the towing itself, not the later storage and disposition. But even when petitioner's argument is so limited, Section 14501(c)(1) cannot plausibly be interpreted to preempt state-law remedies for disputes related to payment for motor-carrier services. Typically, motor carriers provide their services through express or implied contracts, and payment disputes therefore would usually be resolved through state-law contract claims. *Wolens*, 513 U.S. at 228-233. Non-consensual towing services are unusual (at least under New Hampshire law) in that the

person responsible for payment for the services is someone who did not contract for those services. N.H. Rev. Stat. Ann. § 262:40-a(IV) ("The costs of removing a vehicle under this section, including reasonable towing and storage costs, shall * * * be the responsibility of the last registered owner."). There is no federal law governing payment disputes arising from non-consensual towing. If the Act preempted state-law remedies concerning payments for those services, then *no* law would govern such disputes or provide a cause of action to recover losses sustained, whether the claim was asserted by the car owner or the towing company. There is no basis for concluding that Congress intended to create such a legal no-man's land. See pp. 26-28, *supra*.[11]

Moreover, Section 14501(c)(2)(C) expressly allows a state or local government to regulate the price charged for non-consensual towing. It is especially unlikely that Congress nonetheless intended to preclude a State from affording *any* remedies—to either the towing company *or* the owner of the vehicle—if non-preempted state laws regulating the price and the means of paying or recovering it were violated. And, of course, the fact that petitioner invoked state law to recover the unpaid towing and storage charges

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[11] Petitioner argues that respondent could have relied on various criminal provisions in Chapter 262, which, petitioner contends, provide respondent with "significant protection." Pet. Br. 50-51 (citing N.H. Rev. Stat. Ann. §§ 262:1(I)(d), 262:2, 262:41). But petitioner gives no explanation as to how those provisions could be of use when a towing company committed no criminal violation in unlawfully disposing of a vehicle it previously towed. Moreover, criminal sanctions would not furnish a damages remedy. Nor is it evident under petitioner's theory how even criminal provisions would escape preemption.

demonstrates that petitioner does not actually take the position that Section 14501(c)(1) necessarily preempts state law covering payment for towing services.

CONCLUSION

The decision of the Supreme Court of New Hampshire should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

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No. 12-52

In the

Supreme Court of the United States

DAN'S CITY USED CARS, INC. D/B/A
DAN'S CITY AUTO BODY,

Petitioner,

v.

ROBERT PELKEY,

Respondent.

On Writ of Certiorari To The
Supreme Court of New Hampshire

Brief For California Tow Truck Association as Amicus Curiae Supporting Petitioner

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INTEREST OF AMICUS CURIAE[1]

The California Tow Truck Association ("CTTA") is a nonprofit trade association representing more than 1,000 towing companies doing business throughout the state of California. Member companies range in size from small family-run businesses with only one or two tow trucks to large companies with fleets of dozens of tow trucks. Most of CTTA's members conduct towing operations in multiple counties and in and around dozens of cities throughout California. CTTA advocates on behalf of its members and also provides safety training to its members and their employees.

CTTA and its members have a strong interest in motor carrier regulations generally, and have a special familiarity with the interplay between the FAAAA and the towing industry. In California, not only is there extensive regulation of the towing industry at the state level, but many local jurisdictions impose regulations as well. These regulations are not always consistent with state law, and sometimes conflict with each other. This creates problems for towing companies operating in multiple jurisdictions, as towing companies can be subject to conflicting licensing rules, exorbitant fees,

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[1] Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office in conjunction with the certificate of service.

duplicative inspections, and even criminal sanctions. CTTA has an interest in reasonable regulation of the towing industry that sets forth clear rules that apply uniformly, and allow industry operators to run their businesses in a commercially reasonable manner.

SUMMARY OF ARGUMENT

This case involves an interpretation of the preemptive scope of 49 U.S.C. § 14501(c)(1). Although it is in the specific context of possible tort liability for a towing company, the Court's resolution of the question will have far reaching ramifications on the towing industry and for motor carriers generally, in a wide variety of contexts. This Court's prior jurisprudence has acknowledged that there are "borderline questions" but so far has not provided much guidance as to where the scope of preemption ends and more importantly, the analysis to use in determining the scope of preemption in those cases. It has typically left such questions for another day. However, lower courts have struggled with defining the scope of preemption in a variety of contexts. Accordingly, the Court should give guidance as to how the FAAAA should be applied to all state and local laws regulating motor carriers, not just those particular legal claims asserted in this case. CTTA submits that in determining whether a particular law, regulation, or legal claim is "related to" the price, route or service of a motor carrier, courts should be guided by several factors so that the law can be applied consistent with Congress'

intent and motor carriers can operate in a commercially reasonable manner.

ARGUMENT

I. THE EXPRESS PREEMPTION PROVISION IS INTERPRETED BROADLY, BUT THE TEST FOR RESOLVING "BORDERLINE QUESTIONS" REMAINS UNCLEAR

Petitioner makes a compelling argument as to why the particular claims at issue in this case are indeed preempted. Because 49 U.S.C. § 14501(c)(1) has generally been interpreted by this Court and others to have a broad preemptive sweep, identifying claims that clearly are preempted is easier than identifying claims which are not; harder still is identifying where the line is between those two categories. CTTA urges this Court to articulate a rule that will provide clear guidance to both the motor carrier industry and the state and local governments that enact laws and regulations which may impact motor carriers.

This Court has recognized that the Federal Aviation Administration Authorization Act of 1994 ("FAAAA") "generally preempts state and local regulation 'related to a price, route, or service of any motor carrier ... with respect to the transportation of property.'" *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 429 (2002) ("*City of Columbus*"). Specifically, the FAAAA provides:

> "(1) General Rule. Except as provided in paragraphs (2) and (3), a State [or] political subdivision of a State ... may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier ... with respect to the transportation of property."

49 U.S.C. § 14501(c)(1). The FAAAA uses language identical to the Airline Deregulation Act of 1978 ("ADA"). In *Morales v. Trans World Airlines*, 504 U.S. 374 (1992), this Court opined on the scope of the preemptive effect of the language, in the context of Attorneys General from various states seeking to enforce their regulation of airline advertisements. This Court specifically rejected a narrow reading of the preemption clause:

> Petitioner contends that § 1305(a)(1) only pre-empts the States from actually prescribing rates, routes, or services. This simply reads the words "relating to" out of the statute. Had the statute been designed to pre-empt state law in such a limited fashion, it would have forbidden the States to "*regulate* rates, routes, and services."

Id. at 385. The Court then addressed a related argument, i.e. whether preemption is limited only to state laws specifically addressed to the airline industry:

> Besides creating an utterly irrational loophole (there is little reason why state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general statute), this notion similarly ignores the sweep of the "relating to" language. We have consistently rejected this precise argument in our ERISA cases: : "[A] state law may 'relate to' a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect." [Citation.]

Id., at 386. Thus, early on, the language at issue in this case has been found to have a broad sweep. This Court in *Morales* did suggest that some state laws might affect airlines in "too tenuous, remote, or peripheral a manner" to have preemptive effect, but determined that *Morales* "plainly does not present a borderline question," and otherwise declined to offer any guidance as to where to draw the line. *Id.*, at 390.

This Court did articulate at least some parameters to the otherwise broad sweep of preemption in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), which involved a class action suit against an airline by members of a frequent flyer program after the airlne retroactively modified the program. First, this Court held that it made no difference whether the claim involves conduct that

is "essential" to providing the service as opposed to "unessential." *Id.*, at 226. Rather, the salient inquiry was whether the frequent flyer program, which awarded free tickets as well as class-of-service upgrades, related to rates or services, and this Court held that such a program, and the claims alleged thereunder, unquestionably related to both. *Ibid.*

Next, this Court reviewed the Illinois' Consumer Fraud Act and found that because the law was prescriptive and "controls the primary conduct of those falling within its governance," it was preempted. *Id.*, at 227. However, the Court drew a line as to breach of contract claims. Such claims involve an "airline's alleged breach of its own, self-imposed undertakings" and do not involve a state "enacting or enforcing" a law. *Id.*, at 228-229.

The rationale underlying the holdings in *Morales* and *Wolens* was the fact that the preemption provision "was designed to promote 'maximum reliance on competitive market forces.' [Citation]." *Id.*, at 230. That rationale should guide the interpretation of the "related to" clause in the FAAAA.

Most recently, in *Rowe v. New Hampshire*, 552 U.S. 364 (2008), this Court held that a Maine statute aimed at regulating the delivery of tobacco was preempted because it mandated a particular recipient verification delivery service. *Id.*, at 368-371. Although acknowledging that the statute was "less direct than it might be," because it regulated shippers rather than carriers, this Court recognized that the focus had to be on how the law affected motor carriers' prices, routes, and services. *Id.*, at

372. This Court concluded that the case was "no more 'borderline' than was *Morales*." *Id.*, at 376.

II. LOWER COURTS HAVE STRUGGLED WITH THE SCOPE OF PREEMPTION IN "BORDERLINE" CASES

Lower courts have reached varying results as to the types of laws that are "related to" prices routes and services of carriers. For example, in *Californians For Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184 (9th Cir. 1998), the plaintiff contended that prevailing wage laws, which required motor carriers to pay a certain wage to their employees, resulted in price increases of 25% and forced them to re-direct and re-route equipment to compensate for lost revenue. *Id.*, at 1189. However, the Court concluded, without much analysis, that the effect on prices, routes and services was indirect, remote, and tenuous and thus was not "related." *Ibid.*

Seemingly in conflict with *Mendonca*, however, is the decision in *Dilts v. Penske Logistics LLC*, 819 F.Supp.2d 1109 (S.D. Cal. 2011). In *Dilts*, the court determined that California meal and rest break laws were preempted by the FAAAA as applied to motor carriers. *Id.*, at 1120. In reaching this conclusion, the court first noted that "[a]lthough the scope of the preemption clauses of both the ADA and the FAAA Act has been hotly debated, it has never been fully resolved." *Id.*, at 1117-1118. Citing *Rowe v. New Hampshire, supra*, 552 U.S. 364 at 371-372, the court observed that "[i]t is clear that the law at issue need not directly regulate motor

carriers in order to be preempted." Rather, it is sufficient if the law would require motor carriers to offer different services. *Id.*, at 1118. The court also noted that prior decisions had failed to specify "exactly where, or how, it would be appropriate to draw the line between a significant impact and a tenuous effect because neither of the state laws at issue in those cases presented a 'borderline question.'" *Ibid.*

The Court in *Dilts* then turned to some circuit decisions that did present "borderline questions." Specifically, the court cited *American Trucking Assoc., Inc. v. City of Los Angeles*, 660 F.3d 384 (9th Cir.2011) for the proposition that preemption by the FAAAA may occur even when the effect on rates, routes, and services is only indirect and that where the effect on prices, routes, and services may be close to merely tenuous or remote, "the proper inquiry is whether the provision, directly or indirectly, 'binds the ... carrier to a particular price, route or service and thereby interferes with competitive market forces within the ... industry.'" *Dilts, supra*, 819 F.Supp.2d. at 1118, citing *American Trucking Assoc., Inc. v. City of Los Angeles, supra*, 660 F.3d at 396. Employing that inquiry, the court determined that mandating meal and rest breaks for drivers would limit the length of feasible routes and reduce the number of deliveries, thereby limiting the services the carrier could provide. *Dilts, supra*, 819 F.Supp2d. at 1118-1119. The court found that those impacts on routes and services would have a significant impact on prices because additional employees would be needed to

deliver the same level of service, and that would increase costs. *Id.*, at 1119.

The Seventh Circuit recently weighed in on the scope of the preemption provision in *S.C. Johnson & Son, Inc. v. Transport Corp. of America, Inc.* 697 F.3d 544 (7th Cir. 2012). In that case, a manufacturer sued a number of motor carriers involved in a bribery and kickback scheme, alleging that their bribes to one of the manufacturer's employees resulted in them paying higher shipping rates. *Id.*, at 546. The court then undertook a remarkably cogent and comprehensive review of all of the Supreme Court's ADA and FAAAA cases, as well as a number of circuit decisions addressing the scope of preemption. *Id.*, at 549-556.

In an effort to distill a guiding principle from the case law, the court analogized to the production function that drives market transactions in the transportation industry. *Id.*, at 558. The court explained that the transportation industry

> typically includes inputs such as labor, capital, and technology. These inputs are often the subject of a particular body of law. For example, labor inputs are affected by a network of labor laws, including minimum wage laws, worker-safety laws, anti-discrimination laws, and pension regulations. Capital is regulated by banking laws, securities rules, and tax laws, among others. Technology is heavily influenced by intellectual property laws. Changes to these background laws will ultimately

> affect the costs of these inputs, and thus, in turn, the "price ... or service" of the outputs. Yet no one thinks that the ADA or the FAAAA preempts these and the many comparable state laws [citation] because their effect on price is too "remote." [Citation.] Instead, laws that regulate these inputs operate one or more steps away from the moment at which the firm offers its customer a service for a particular price. The laws prohibiting bribery, racketeering, embezzlement, industrial espionage, and gambling similarly set basic rules for a civil society, rather than particular terms of trade between parties to a transaction.

Ibid. While this analogy has some appeal as an analytical tool for deciding the scope of preemption in borderline cases, it overlooks the fact that some laws may have such a significant effect on inputs that, even though they occur one or more steps away from the commercial transaction, they so impact the transaction as to significantly raise the price, alter the route, or restrict the service that the carrier can provide. In other words, a "background law" only one step away from the commercial transaction may have a minor impact and thus not be preempted, but a major change to a background law several steps back from the transaction may be so significant, or affect the transportation industry in such a unique way, that it could be preempted.

Moreover, the approach suggested by the court in *S.C. Johnson* would not appear to easily resolve the conflict noted earlier between *Mendonca* and *Dilts*. In *Mendonca*, cited with approval in *S.C. Johnson*, the court found prevailing wage laws were not preempted. Using the production function analysis, it is true that prevailing wage laws could be considered "background laws" that impact the price of the labor input but are not so connected to the commercial transaction as to be preempted. But the same could be said of the meal and rest break laws that were found to be preempted in *Dilts*. Like prevailing wage laws, meal and rest break laws increase the input cost of labor and are removed from the transaction between the carrier and the customer. The "production function" analysis in *S.C. Johnson* would appear to reach a different result than the court did in *Dilts*. Thus, despite a thorough and scholarly effort, the approach that the court settled on in *S.C. Johnson* does not fully account for the myriad ways in which "background laws" of general application have a particularized impact on the motor carrier industry, and does not always lead to predictable results which square with other decisions. Accordingly, consideration of more than just the "production function" is necessary.

III. THE TOWING INDUSTRY CURRENTLY OPERATES WITH PARTICULARIZED INPUTS AND IN THE CONTEXT OF A LARGE BODY OF FEDERAL, STATE, AND LOCAL REGULATION

The "production function" approach of the court in *S.C. Johnson* is commendable in that it

recognizes that every preemption question must be viewed in the context of the particular industry being impacted by the law in question. Focusing on the particular production inputs is important, because different industries have different inputs, and laws that affect one industry in only a minor respect could have huge ramifications in a different industry. To that end, it is important to understand how the towing industry works, including the inputs it uses and the legal framework in which it operates. Only then can an intelligent inquiry about preemption be had.

A. The Towing Industry Provides a Unique Array of Services for the Motoring Public

Towing companies provide services to a variety of customers. They are perhaps best known for providing roadside assistance to motorists who run out of fuel, have a flat tire, or are experiencing mechanical problems with their vehicle. This service can be provided directly to the motorist, but is often provided by the towing companies as subcontractors for a motor club. In such circumstances, the motorist has an existing contractual arrangement with a motor club which guarantees a defined level of roadside assistance service for a particular membership fee. The motor clubs then contract with individual towing companies to provide that service.

Towing companies also contract directly with various state and local governments to provide towing services to law enforcement. When law

enforcement responds to a vehicle accident, they will often need to clear the roadway promptly to get traffic flowing, and thus they will dispatch one of their contracted towing companies to the scene of the accident. The towing company then removes the damaged vehicle from the roadway and coordinates with the vehicle's driver (or their insurance company) to deliver the vehicle to the repair facility designated by the owner. They provide another service to law enforcement in the form of impounds. Various state and local laws allow or require a vehicle to be impounded when the driver has been arrested for certain offenses, including, for example, driving under the influence of an intoxicating substance. In such situations, law enforcement directs the towing company to tow a vehicle to a preapproved storage lot, and to hold it until law enforcement authorizes the release of the vehicle.

Towing companies also provide services to private property owners who wish to remove vehicles from their parking lots. In these arrangements, towing companies commonly contract with stores, apartment complexes, and small business where parking is at a premium, and guarantee to respond quickly when called and to remove unauthorized vehicles so that spaces can be made available for the business' paying customers.

It is common for most towing companies to engage in all three of the types of business described above, although some companies specialize. The common thread in all of the services provided is that towing companies are mobile. They are constantly moving through different jurisdictions, especially in dense urban areas, and often operate in multiple

jurisdictions. Because their services may be needed any time of day or night, most towing companies are staffed as a 24-hour, seven-days-per week operation, such that they are always able to dispatch trucks and drivers to wherever they are needed.

The typical inputs for the towing industry are labor, in the form of drivers; capital, in the form of land for storage lots and money to purchase tow trucks; and technology, in the form of dispatch and communications equipment.

B. Federal Law Regulates the Towing Industry in a Way that Impacts the Labor Input

Under the authority of 49 U.S.C. § 31502, the Federal Motor Carrier Safety Administration within the Department of Transportation has prescribed "hours of service" regulations for motor carriers. See 49 CFR § 395. The purpose of these regulations is to "reduce excessively long work hours that increase both the risk of fatigue-related crashes and long-term health problems for drivers." Federal Register, Vol. 76, No. 248, December 27, 2011, p. 81134.

These regulations are highly technical, but basically limit the number of hours drivers can be on duty consecutively, and mandate a certain number of consecutive off-duty hours before a driver can drive again. Driers must maintain detailed logbooks of their on-duty and off-duty start and stop times, and must have it with them at all times and present it to law enforcement upon demand. While it is beyond the scope of this case, suffice it to say that rules are so complex, and the exceptions so numerous, that an entire industry of software

programs has developed to assist towing companies in managing their staffs to comply with hours of service, yet still have drivers available on a round-the-clock basis.

Juggling the need to have drivers available at any time of day with the need to comply with hours of service means that the labor input to a towing company is significantly more expensive. A towing company cannot rely merely on general overtime laws, and simply pay drivers more to work extra hours. Quite the contrary, towing companies have to hire a sufficient number of additional drivers to cover all the shifts and allow all the drivers to have enough off-duty time to be in compliance with hours of service regulations. If a driver calls in sick, the towing company cannot simply call another driver back to work to cover that shift, because that driver may not yet have spent enough time off duty to be able to start work again. As a result, the labor costs for a towing company are higher and require a substantial amount of management.

C. State Regulation of the Towing Industry is Extensive

In addition to the federal government, many states also impose their own laws on the towing industry. For example, in California, the Legislature has already enacted numerous statutes regulating the towing industry. Tow trucks are defined by California Vehicle Code section 615. Virtually every aspect of tow trucks and their

equipment is regulated by state law, including the position of their license plates,[2] the requirement of tail and stop lamps,[3] the use of flood lamps,[4] the requirement of warning lamps,[5] the maintenance of brakes,[6] the requirement to carry a broom,[7] the requirement to carry a shovel,[8] the requirement to carry a fire extinguisher,[9] the requirement of signage on the tow truck,[10] and the requirement of safety chains.[11]

In addition to the truck and its equipment, all towing businesses are required to obtain a motor carrier permit.[12] All trucks must display the motor carrier identification numbers on the vehicle.[13] The manner in which the towing businesses conduct their operations is also strictly regulated. For example, statutes specify the conditions under which towing can occur in a variety of situations.[14] Moreover, the way towing firms run their business and finances is heavily regulated. There is a strict prohibition on gifts or commissions.[15] They must observe certain speed limitations.[16] They cannot

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[2] Cal. Veh. Code § 5201, subd. (a).
[3] Cal. Veh. Code §§ 24600, 24603, 24605.
[4] Cal. Veh. Code § 25110.
[5] Cal. Veh. Code § 25253.
[6] Cal. Veh. Code §§ 26454, subd. (b), 26458
[7] Cal. Veh. Code § 27700, subd. (a).
[8] Cal. Veh. Code § 27700, subd. (b).
[9] Cal. Veh. Code § 27700, subd. (c).
[10] Cal. Veh. Code § 27907.
[11] Cal. Veh. Code § 29004.
[12] Cal. Rev. & Tax. Code § 7232.
[13] Cal. Veh. Code § 34507.5.
[14] Cal. Veh. Code §§ 22652-22659.
[15] Cal. Veh. Code § 12110.
[16] Cal. Veh. Code § 22406.1.

solicit business except in certain circumstances.[17] They must accept certain forms of payment.[18] And they must maintain records of stored vehicles.[19]

All of the foregoing requirements impose additional costs and require additional capital outlay to ensure that all tow trucks comply with the statutory mandates and that all required equipment is present on each truck.

In addition to the foregoing list of statutory requirements, which is far from exhaustive, the vast majority of CTTA members participate in the California Highway Patrol ("CHP")[20] rotation system. Under this system, whenever there is a vehicle accident or criminal incident that requires towing services, CHP contacts the next towing company on the approved list. Being on the list ensures a reliable stream of calls and is a good adjunct to other towing business that a company may be able to generate. To get on the rotation list, CHP requires operators to:

- have a minimum of 3 years of experience;
- participate in a drug and alcohol testing program;
- maintain minimum staffing levels and hours of operation;
- meet maximum response times;

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[17] Cal. Veh. Code § 22513.

[18] Cal. Veh. Code § 22651.1.

[19] Cal. Veh. Code § 10650.

[20] The CHP is California's primary statewide law enforcement agency, analogous to the State Police in other states, and is charged with, inter alia, enforcing all laws and regulating the operation of vehicles and the use of highways. *See* Cal. Veh. Code §§ 2250, 2400, subd. (b).

- have an adequate storage facility;
- meet minimum equipment specifications;
- allow CHP to inspect all trucks at least one per year;
- charge reasonable rates;
- maintain minimum levels of insurance;
- adhere to a code of conduct.

D. Local Governments within California Impose Additional Regulations on the Towing Industry

In addition to the foregoing requirements at the state level, numerous local governments have imposed regulations on towing within their jurisdictions. The City and County of San Francisco requires any tow truck driver operating within the city to have a license, and requires the towing company to also obtain a license, at a cost of more than $1,000 per truck and driver per year.[21] Other cities have different permitting and licensing schemes.[22] Many of these schemes require truck inspections that are duplicative of those required by the CHP, and impose requirements that may conflict with those of the CHP or those of neighboring jurisdictions. It is the nature of the towing business that a company must be staffed to tow cars on a 24-hour basis as needed. Moreover, because the dispatcher never knows where services

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[21] S.F. Police Code §§ 3000, 3050.

[22] *See, e.g.*, San Jose Mun. Code § 6.66.010 et seq., Los Angeles Mun. Code § 103.204 et seq., Turlock Mun. Code § 4-15-101 et seq.

will be needed, all trucks and all drivers need to be able to respond to any type of call. Thus, as a practical matter, every tow truck and every driver must be in compliance with every law. But by their very nature, participants in the transportation business are mobile, and drive through many different jurisdictions. Because towing companies commonly do business in multiple cities, especially in dense metropolitan areas where one city runs into the next, it is often financially infeasible and/or practically impossible to be in compliance with the laws of all the jurisdictions that a tow truck driver may pass through on a given day.

E. California's Laws Create Liability for Enforcement Actions and Civil Damages

Towing businesses in California not only face the prospect of regulatory enforcement of the myriad rules and regulations that apply to their business, but they also face the possibility of civil liability of the kind involved in this case to the extent they are sued by a private citizen for violating one or more of the laws or regulations. As just one example, Vehicle Code section 22658 imposes numerous and detailed requirements for towing a vehicle from private property. The violation of any one of the multiple requirements can expose a towing company to criminal fines, imprisonment, and civil liability with quadruple damages. *See, e.g.*, California Vehicle Code section 22658, subdivision (j).

F. All of the Laws Imposing Liability Must Be Examined Collectively In Light of the Way Towing Companies Operate

In order to determine whether a particular law (or a claim based on a particular law) is preempted, the law cannot be viewed in isolation. Rather, it is imperative that it be viewed in light of the existing regulatory framework and the manner in which towing businesses currently operate to comply with all of the laws that govern them. Only when viewing a challenged law or claim through the lens of a towing company can the relevant factors for determining the scope of preemption be identified.

Thus, in order to identify the factors that are relevant, it is necessary to understand particular aspects of the motor carrier industry and how they function in the modern economy. As different sectors of our society continue to grow ever interconnected, not only do states and local jurisdictions enact more laws and regulations, the number of industries impacted by regulations continues to expand, at times to sectors that were likely not contemplated when the laws were enacted.

As just one example, consider the fact that with technological advances, many towing companies have transitioned from traditional radio-based dispatch equipment in trucks to cellular smartphone devices, which provide greater range, clearer signals, and GPS technology to instantly and accurately track the location of tow trucks. Many states have passed or are contemplating laws that ban the use of cell phones while operating a motor

vehicle. Those laws, if applied to tow truck drivers, could very well impact the ability of towing companies to provide timely and efficient service to its customers. Although such laws may be aimed at the public in general, they may have a particularly large impact on the towing industry, which has made significant capital investment in the new technology on the assumption that using the technology will pay off over time.[23]

IV. IN EVALUATING THE SCOPE OF PREEMPTION, COURTS SHOULD CONSIDER THE MAGNITUDE OF THE IMPACT, THE CUMULATIVE EFFECT OF THE LAW WITH OTHER LAWS, AND THE EXTENT TO WHICH TOWING COMPANIES CAN MANAGE THE RISK IF LIABILITY IS IMPOSED

A. The Magnitude of the Impact of a Law on Prices, Routes, and Services is a Key Consideration

Because of the plethora of laws and regulations, it is sometimes difficult to know how or even whether a law impacts the transportation

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[23] It is possible that such a law would be saved from preemption under the safety exception in 49 U.S.C. § 14501(c)(2). The applicability of the safety exception is beyond the scope of this case, and in any event, before determining whether the safety exception applies, it is always necessary to first determine whether the law in question is even "related to" prices routes or services in the first place. *See, e.g.*, *Automobile Club of New York, Inc. v. Dykstra*, 520 F.3d 210, 214, fn. 2 (2nd Cir. 2008),

industry merely be resorting to the text of the law. A law that is not directly aimed at the transportation industry can have a huge, perhaps unintended impact on motor carriers. Accordingly, focusing on the whether the law "directly" or "indirectly" impacts motor carriers is unhelpful. As the Ninth Circuit court noted in *American Trucking Assoc., Inc. v. City of Los Angeles, supra,* 660 F.3d at 396, courts "must examine the actual or likely effect of a State's action." Whether the effect occurs "directly" or "indirectly" is irrelevant. *Id.*, at 396-397. What matters is the nature of the effect. *See Rowe, supra*, 552 U.S. at 372.

Depending on the precise nature of the law, it may require a minor modification to the manner in which towing companies do business, or it may require wholesale changes to the business model, retrofitting of trucks, and retraining of personnel, all of which will directly impact the prices, routes and services that towing companies can provide. The greater the impact, the more likely a law is to be preempted. Thus, the magnitude of the impact on the transportation industry is a factor that courts must consider in assessing whether a particular law is preempted.

B. The Cumulative Effect of Related Laws May Militate in Favor of Preemption

A single law may not appear to have much impact until reference is made to the greater scheme of regulations of which it is merely a part. In that vein, it is important to keep in mind that the towing industry is already heavily regulated by state and

local government, and, if history is any indication, the industry will likely be subject to an ever-increasing number of laws and regulations on a growing list of topics.

While compliance with any one law or regulation may not be burdensome, the cumulative effect of trying to comply with multiple, overlapping, and sometimes conflicting laws can be extremely costly. Rather than bear the costs, some towing companies simply alter their routes so as to avoid jurisdictions that impose onerous requirements. Other companies try to maintain their routes, but limit the level of service they provide as a cost-saving measure. The net effect is that the various laws, collectively if not singly, undeniably impact prices, routes and services.

Each additional law or regulation may only incrementally impact prices, routes, or services, such that, one could argue that any one of them, standing alone, has only a tenuous effect. But as the number of laws and regulations multiply, there is a tipping point at which it becomes commercially unreasonable to comply with all of them. The impact of a single law necessarily depends on the interplay it has with other applicable laws governing the same conduct. A minor tweak in one law can have far reaching ramifications if it conflicts with other laws or changes the manner in which they can reasonably be applied.

Accordingly, in some situations, it may be necessary to look at the overall body of laws that regulate a motor carrier, or an entire regulatory framework, to determine whether one particular law is preempted.

For example, the requirement of California Vehicle Code section 27700, subdivision (b) that tow trucks must be equipped with a shovel may not appear to be overly burdensome. But when combined with separate rules requiring that trucks have a broom, and a fire extinguisher, and specified chains, and other equipment, there may be a problem. There is a finite amount of space on a tow truck, and at a certain point, if tow truck drivers have to make room for certain items required by law, they may not have room left to carry hydraulic jacks, pneumatic tire-changing equipment, or extra gasoline for stranded drivers. The inability to carry those items would naturally impact the type and quality of services they could provide to motorists. For these reasons, the cumulative effect of the challenged law must be considered in light of the other laws already governing the industry and the way in which a motor carrier has adapted his or her business to comply with those laws.

C. The Ability of the Industry to Manage the Risk in a Commercially Reasonable Manner Should Be Considered

When plaintiffs seek to impose civil liability based on an alleged violation of one or more of the numerous laws governing motor carriers, courts should also consider traditional risk management strategies. Businesses routinely engage in risk management by trying to reduce their liability in a reasonable way. They commonly use traditional cost-benefit analyses to decide whether to invest in more training and newer equipment to reduce the

likelihood of liability, or whether instead to simply purchase insurance to cover the potential exposure. Thus, when analyzing whether a civil claim based on a statutory or regulatory violation is preempted, courts should consider whether the cost of managing the risk is commercially reasonable. In a heavily regulated industry like transportation, it may not be possible for motor carriers to manage all of the risk or insure against every possible civil claim. Even if it is possible, it will likely only be achieved at significant cost, which will naturally have a direct impact on the prices the business charges for its services.

V. THESE FACTORS CAN HELP RESOLVE "BORDERLINE QUESTIONS"

From the foregoing, the following factors emerge as critical considerations when evaluating the scope of preemption in "borderline" cases. First, the magnitude of the impact must be evaluated. Often, this can be measured in dollars, but for many laws the question will turn on the degree to which services are impaired or reduced, or the extent to which routes must be altered. *See, e.g., Dilts v. Penske Logistics LLC, supra*, 819 F.Supp.2d at. 1119 [finding that mandatory meal and rest breaks would require different routes and delay deliveries to consumers].

Second, courts should consider the cumulative effect of the multiple and perhaps even conflicting laws under which a motor carrier must operate. Is the motor carrier in question already heavily regulated by other laws that are not being

challenged as preempted? If so, how do those laws, in combination with the law under review, act together to impact prices, routes, and services? Thus, even if the law being challenged had only an incremental additional impact on prices, routes, or services in light of other laws, it could be the case that that impact, though relatively minor, is sufficient to tip the balance so that the competitive forces of the market can no longer operate with stability. Finally, when deciding whether to impose civil liability for an alleged breach of a particular law, courts should consider the cost and availability of commercially reasonable risk management strategies. In other words, would a reasonable tow truck operator be able to foresee the liability and take reasonable steps to manage that risk without significantly raising his prices, or altering his services?

While the facts of the instant case do not present a "borderline question" they serve as a useful backdrop to illustrate the application of the foregoing factors. For example, Count II of the complaint[24] alleges breaches of common law and statutory duties to use reasonable care to ascertain the identity of a vehicle's owner, to return it to him

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[24] Count II provides a better illustration than Count I, which alleges a violation of New Hampshire's Consumer Protection Act. This claim is easy to deal with, as courts have been fairly unanimous that consumer fraud laws are preempted because they "necessarily have an industry-wide effect on prices and services, since they dictate the rules for price advertising and other marketing practices." *S.C. Johnson & Son, Inc. v. Transport Corp. of America, Inc., supra*, 697 F.3d at 559, citing *Morales, supra*, 504 U.S. at 389–90.

and to use reasonable care in disposing of the vehicle. Assuming such duties exist at common law in New Hampshire, it would be appropriate to first consider the magnitude of the impact on prices, routes or services that would occur if towing services were required to spend time, money, and personnel resources identifying the owners of abandoned vehicles. Since towing companies generally are not equipped to perform the services of a private investigator business, it presumably would have to devote significant resources to tracking down such individuals, at great cost, and with the result being fewer staff to perform the core functions of the towing business, i.e. driving tow trucks, hauling vehicles, and assisting motorists. Similarly, the context of the law is important, because at the time of this case, New Hampshire law did not provide a mechanism for towing companies to obtain the identity of the vehicle owner. Petitioner's Brief on the Merits, p. 14, fn. 11. Thus, while the duty to identify a vehicle owner may be relatively innocuous in the abstract, the fact that other laws do not allow the dissemination of the necessary information changes the calculus. There do not appear to be multiple and conflicting laws addressing this issue in New Hampshire, such that the cumulative nature of the laws may not be a big factor for this claim. However, the cost of risk management is very relevant to this claim. As alluded to by the petitioner, it is difficult to know how much effort would have to be devoted to identifying unknown owners in order to be deemed "reasonable." *See* Petitioner's Brief on the Merits, p. 37. A reasonable towing company operator could never be certain

whether he was effectively reducing his liability by expending resources on such endeavors. The costs, however, would be significant and would necessarily detract from the level of services that company could provide. Accordingly, the factors advanced by CTTA counsel in favor of preemption.

CONCLUSION

This Court has previously opined on the scope of preemption in *Morales*, *Wolens*, and *Rowe*, but none of those presented the more difficult "borderline questions." To assist courts, motor carriers, and state and local governments, CTTA urges this Court to articulate the relevant factors that should be considered in determining whether a particular law should be preempted. Those factors include the magnitude of the impact, the extent to which other cumulative or conflicting laws govern the same motor carrier conduct, and the extent to which it is commercially reasonable to manage the risk that would flow from imposing liability. Applying those factors to the facts of this case, the judgment of the New Hampshire Supreme Court should be reversed.

Respectfully submitted,

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January 28, 2013

AMICUS CURIAE BRIEF

No. 12-52

IN THE

Supreme Court of the United States

DAN'S CITY USED CARS, INC. D/B/A
DAN'S CITY AUTO BODY,
Petitioner,

v.

ROBERT PELKEY,
Respondent.

ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

MOTION FOR LEAVE TO FILE AND BRIEF FOR *AMICI CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, AND NATIONAL LEAGUE OF CITIES IN SUPPORT OF RESPONDENT

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, AND NATIONAL LEAGUE OF CITIES IN SUPPORT OF RESPONDENT

Pursuant to Rule 37.3(b), the International Municipal Lawyers Association, the National Association of Counties, and the National League of Cities respectfully move to file the attached brief as *amici curiae* in support of Respondent. Respondent consented to the filing of this brief on February 6, 2013, but Petitioner withheld its consent on February 20, 2013. The parties' letters consenting or withholding such consent have been filed with the Clerk's office in conjunction with the certificate of service.

The International Municipal Lawyers Association ("IMLA") is a nonprofit, nonpartisan professional organization consisting of more than 3500 members. The membership is comprised of local government entities, including cities and counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts.

The National League of Cities ("NLC") is dedicated to helping city leaders build better communities. Working in partnership with the 49 state municipal leagues, NLC serves as a resource to and an advocate for the more than 19,000 cities, villages and towns it represents.

The National Association of Counties ("NACo") is the only national organization that represents county governments in the United States. NACo provides essential services to the nation's 3,068 counties through advocacy, education and research.

Each of the Amici Curiae has an interest in protecting residents of their member communities from predatory towing and in maintaining local autonomy for regulating nonconsensual towing and the commercially reasonable disposition of those towed vehicles.

Wherefore, the *amici curiae* respectfully request that their motion for leave to file the enclosed brief be granted.

Respectfully submitted.

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INTERESTS OF THE *AMICI CURIAE*[1]

As noted in the motion for leave to file, *supra*, the International Municipal Lawyers Association ("IMLA"), the National League of Cities ("NLC"), and the National Association of Counties ("NACo") have an interest in protecting residents of their member communities from predatory towing and in maintaining local autonomy for regulating nonconsensual towing and the commercially reasonable disposition of those towed vehicles.

SUMMARY OF THE ARGUMENT

Tow companies are reputed to engage in predatory conduct, and incidences of such conduct are not isolated. Regulation of such nonconsensual tows and particularly disposition of the towed cars in conformity with state common law bailment must remain regulated at the state and local level.

Petitioner's interpretation of 42 U.S.C. § 14501(c)(1) contradicts the statute's established

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[1] Pursuant to Rule 37.6 *amici curiae* affirm that no counsel for a party authored this brief in whole or in part, that no counsel or a party made a monetary contribution intended to the preparation or submission of this brief, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Respondent consented to the filing of this brief on February 6, 2013, but Petitioner withheld its consent on February 20, 2013. The parties' letters consenting or withholding such consent have been filed with the Clerk's office in conjunction with the certificate of service.

purpose and a plain reading of its text. Courts have consistently found the purpose of § 14501(c)(1) to be the creation of a consistent regulatory climate in order to eliminate burdens on tow truck companies and promote economic efficiency. To allow Petitioner's reading of the statute would manipulate New Hampshire law under the guise of preemption and would create information asymmetries and other economic inefficiencies within the market. Further, a plain reading of the statute demonstrates that the broad phrase "related to" is constrained by later language, including "with respect to the transportation of property."

Conflicting judicial rulings on the preemption of particular regulations have created substantial legal uncertainty as to which regulations are exempt from preemption under the "safety regulation" exception. The Federal government is incapable of properly addressing abusive towing practices, as demonstrated by its shift from regulation to deregulation. Towing companies already abide by state regulations on private trespass towing. According to a May 2007 report issued to Congress by the Motor Carrier Safety Division, towing organizations such as the Towing and Recovery Association of America would prefer to remove confusion surrounding preemption and leave state and local governments free to enact regulations. Preserving state regulations in place will continue to allow consumers to be able to seek redress at the state level.

ARGUMENT

I. THE TOWING INDUSTRY IS RIFE WITH PREDATORY CONDUCT AND UNFAIR BUSINESS PRACTICES

Consumers frequently report towing companies engaging in less-than-wholesome business practices. A tow truck can provide a driver with necessary assistance during a vulnerable moment, such as towing a vehicle stranded as the result of an accident or breakdown. Unfortunately, drivers are often confronted by tow truck companies that tow away vehicles under questionable circumstances. While some experiences of ordinary citizens are particularly outrageous, complaints regarding the conduct of tow truck operators are unfortunately all too common.

A. Tortious Conduct by Tow Companies is Widespread.

Many citizens have had the unpleasant experience of leaving their automobile to run an errand, only to find upon their return their vehicle is no longer there, or is in the process of being hauled away.

For example, the Immanuel Presbyterian Church in Hollywood discovered the vehicle it used to deliver goods to the poor had been taken from its own parking lot in the middle of the night. After locating the tow company that had taken the vehicle, the church inquired who had authorized its removal. The

company gave the church's address, claiming that the church had ordered the vehicle towed. *See* Andrew Pollack, *Tow Trucks Prowl, Authorities Crack Down*, N.Y. TIMES (July 31, 2005), http://www.nytimes.com/2005/07/31/national/31towing.html?pagewanted=all.

In Silver Spring, Maryland, a driver parked his car at an office supply store and walked to an ATM while his daughter, the passenger, went into the store. The driver then walked into the store to locate his daughter and to pay for her supplies. Upon emerging from the store, he saw his car getting towed. The tow truck driver alleged that the driver had "walked off" and was not a patron of the supply store. *See* Aaron Kraut, *'Predatory towing' complaints a growing problem in Wheaton*, GAZETTE (May 16, 2012), http://www.gazette.net/apps/pbcs.dll/article?AID=/20120516/NEWS/705169561/1007/news&source=RSS&&template=PrinterFriendlygaz.

Additionally, a Portland woman woke up one morning and went to her paid-for parking spot to retrieve her vehicle and head to work. Her car was not there, and she thought her vehicle had been stolen. She went to her apartment building's management office, and before calling the police, the manager thought to check with the tow truck company that monitored the parking lot. A towing company employee had taken the vehicle because, while the employee could see the parking permit in the woman's car, he could not see the expiration date on the permit. *See* Jenny Hansson, *Portland towing*

company's ethics questioned (Dec. 1, 2011), http://www.koinlocal6.com/news/local/story/Portland-towing-companys-ethics-questioned/7IHLZFz_f06ytB0s22XB_A.cspx.

The above stories are but a few among many examples of nonconsensual towing that unfairly impinged upon the rights of the vehicle owner.

B. Tortious Conduct by Tow Companies Extends to Disposition and Sale of Nonconsensually Towed Vehicles

Against the backdrop of unscrupulous tow companies, anecdotal evidence of unscrupulous sales also abounds. For example, a Miami resident rented a parking space from a private facility to store his car. Without receiving any notice, a towing company towed his vehicle and sold the car at an "auction" to one of its own employees. *See* Francisco Alvarado, *Tow and Sell: He says Beach Towing took his car. Is yours next?*, MIAMI NEW TIMES NEWS (Feb. 9, 2006), http://www.miaminewtimes.com/2006-02-09/news/tow-and-sell/.

Similarly, a Seattle couple went on a long business trip and left their car in their condominium's garage. While they were away, their car was towed and sold at auction. The couple later realized that they had parked their car on the wrong floor of their garage. The tow company, however, had taken their vehicle under the authorization of an individual whom the company knew could not authorize the car's removal. Additionally, the

company sold the car with a significant amount of the couple's personal property inside. *See* Danny Westneat, *Seattle Couple's Car Towed into a Twilight Zone*, SEATTLE TIMES, (Feb 13, 2012), http://o.seattletimes.nwsource.com/html/dannywestneat/2017485688_danny12.html.

The frequency of predatory conduct by towing companies shows that there would likely be continued abuse if the Federal Aviation Administration Authorization Act ("FAAAA") of 1994 was interpreted as deregulating sale and disposal of nonconsensually towed vehicles.

C. Stories of Tow Truck Operator Malfeasance Are Not Isolated Incidents.

The behavior of tow truck companies affects communities large and small. The Officer of Consumer Complaints for Montgomery County, Maryland has received hundreds of complaints since 2010 regarding the practices of tow truck companies. Continuing the trend from previous years, the officer received 61 complaints between January–May 2012. *See* Kraut, *supra*. In 2011, the Better Business Bureau ("BBB") received 150 complaints and more than 5,800 inquiries about towing services over a period of 36 months regarding towing services in Charlotte. *BBB Warns Clemson and Virginia Tech Fans about Towing in Charlotte*, BETTER BUS. BUREAU (Nov. 28, 2011), http://charlotte.bbb.org/article/bbb-warns-clemson-and-virginia-tech-fans-about-towing-in-charlotte-31005. In the same year, Austin, Texas saw a 55

percent increase in the number of towing complaints that the BBB received over a 12-month period. *Complaints Against Towing Companies Rise 55 Percent*, BETTER BUS. BUREAU (July 22, 2011), http://austin.bbb.org/article/complaints-against-towing-companies-rise-55-percent-28481.

Aggressive towing practices have also been reported in other major cities. In a 2011 Member Company Survey conducted by the Property Casualty Insurers Association of America, respondents reported that Chicago, Philadelphia, New York, Atlanta, and Houston are particularly renowned for aggressive towing practices. *See Towing and Storage Wars: PCI Releases Special Report to Help Motorists*, PROP. CAS. INSURERS ASS'N AM. (Aug. 12, 2012), http://www.pciaa.net/LegTrack/web/NAIIPublications.nsf/lookupwebcontent/CD76A90E622061A486257A610063EAC?opendocument.

In 2011, there were over 184,000 inquiries and 2,900 official complaints filed nationwide with the BBB concerning automotive towing practices. *See 2011 Complaint and Inquiry Statistics*, U.S. Statistics Sorted by Industry, BETTER BUS. BUREAU 42 (2011), http://www.bbb.org/us/storage/0/Shared%20Documents/complaintstats/stat2011/US%20-%20Industry%20-%202011.pdf. While complete national data for 2012 regarding automotive towing is not yet available, the BBB reported that by the end of September 2012, it had received more than 4,000 official complaints regarding the behavior of tow truck companies.

Thousands of Consumers File Complaints Against Towing Companies, BBB Reports, BETTER BUS. BUREAU (Sept. 28, 2012), http://austin.bbb.org/article/thousands-of-consumers-file-complaints-against-towing-companies-bbb-reports-37196.

This widespread misbehavior by tow truck operators counsels caution and deliberation when considering whether FAAAA preempts the statutes at issue, and others like them, in this case.

II. THE PURPOSE OF CONGRESS IN PASSING § 14501(c)(1) WAS NOT TO PREEMPT STATE LAW CAUSES OF ACTION ARISING FROM DISPOSITION OF NONCONSENSUALLY TOWED VEHICLES

The common practices of statutory interpretation by this Court demonstrate that § 14501(c)(1) does not preempt any of Respondent's claims. First, by using tools of interpretation specifically applied by this Court to preemption statutes, FAAAA yields a purpose of promoting economically sound practices in the trucking industry, which is antithetical to Petitioner's application of the statute. Second, a plain reading of the text demonstrates both the soundness of the interpretation supporting the Respondent, and the degree to which the text of FAAAA must be manipulated and stretched to support the business activity of the Petitioner.

A. Congress' Purpose in Passing § 14501(c)(1) Was Not to Deny a Remedy For Improper

Disposition of Nonconsensually Towed Vehicles.

Analysis of a statute's preemptive purpose must begin with its text. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484-85 (1996). In addition to the language of the text, an "understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law" is equally relevant. *Id.* at 486.

Two important presumptions further guide an analysis of the preemptive effect of statutes. First, "[i]n all preemption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Id.* at 485 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Second, "'[t]he purpose of Congress is the ultimate touchstone' in every preemption case." *Id.* (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)). These presumptions guide the determination of the purpose of Congress in enacting § 14501(c)(1).

Modern federal courts have used these methods and guidelines to arrive at a consistent interpretation of the purpose of § 14501(c)(1). Through the use of an overarching federal statute, Congress sought to "eliminate a tangled web of state and local ordinances that regulated the transportation of property" by motor carriers. *R.*

Mayer of Atlanta, Inc. v. City of Atlanta, 158 F.3d 538, 546 (11th Cir. 1998) (discussing § 14501(c)(2)(A) exception abrogated by *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 449 (2002)). This Court noted that FAAAA was meant to remedy the unreasonable burden on free trade that occurred based on the state's differing regulations. *Ours Garage*, 536 U.S. at 440.

In short, it is clear that the goal of FAAAA was to provide a more uniform environment for trucking companies to promote their economic enterprises. The statute sought to protect industries involved in the movement of property from being subject to various regulations that would only hinder the industry's autonomy in operating its prices, routes, and services.

To expand the meaning of § 14501(c)(1) to include the preemption of statutes which protect citizens from improper disposition of nonconsensual tows seems strained at best. The laws which Mr. Pelkey sought protection under not only fall within the "traditional police powers" of New Hampshire to protect its citizens, but also foster the economic efficiency which § 14501(c)(1) stands to encourage. New Hampshire has provided tow truck enterprises with a legal framework to sell towed vehicles at auction to recoup any outstanding debts incurred. New Hampshire attaches simple conditions to these auctions, which prevent misinformation and allow the rightful owner to receive, at minimum, notice of the vehicle's impending sale.

Petitioner seeks to flip the very essence of § 14501(c)(1) on its head to serve its own purposes. Under the guise of preemption, Petitioner wants to create a situation where it does not have to follow one section of New Hampshire law to enjoy the benefits of another. The two sections of the New Hampshire statute clearly promote different aspects of economic efficiency: Sale of towed cars encourages efficient use of resources, while notice to the owner eliminates information asymmetries within the market. Petitioner seeks to use § 14501(c)(1) to prevent requiring tow truck companies to contact rightful owners before selling the vehicle. Therefore, Petitioner would both perpetuate and profit from inefficiencies within the market for towed cars. This distortion of federal law promotes economic inefficiency, the very opposite of the purpose of § 14501(c)(1).

B. The Plain Language of FAAAA and Related Amendments Do Not Show a Congressional Purpose to Preempt State Law Causes of Action Arising from Towing Abuses.

A plain reading of FAAAA fails to demonstrate any intention of Congress to preempt claims such as the ones advanced by the Respondent. Upon examination of the phrases "relating to"—and "with respect to"—"the transportation of property," a plain reading does not support expanding the meaning of the text to include the interpretation offered by Petitioner.

Traditionally, courts have focused on the expansive nature of the phrase "related to." *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992). The ordinary meaning of "related to" is broad: "[T]o stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with." *Id.* (citing Black's Law Dictionary 1158 (5th ed. 1979)). The Court held that "the words thus express a broad pre-emptive purpose." *Id.*

Nevertheless, the phrase "related to" does have its limits. The phrase "related to" means nothing without considering the rest of the statute. Decisions discussing statutes such as the Airline Deregulation Act ("ADA") and FAAAA focus on the broad scope of "related to" only as it is constricted by the qualifying language of the statute. Indeed, this Court has recognized that § 14501(c)(1) was modeled on previous statutes such as the ADA. *See Rowe v. New*

Hampshire Motor Transport Ass'n, 552 U.S. 364, 390 (2008). In examining that statute, this court noted that the effect of the phrase "related to" on state statutes is limited. This court explained that "[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner" to preempt the state laws on the matter. *Id.* (quoting *Morales*, 504 U.S. at 390). It further emphasized the limits of preemption power in *Morales*, 504 U.S. at 390-91, when this Court stated "we note that our decision does not give the airlines *carte blanche* to lie to and deceive consumers * * *." Therefore, this Court has cautioned that an extreme expansion of the implied meaning of a regulatory scheme may not survive judicial review.

Applying such caution to the statute at issue, members of this Court have suggested the preemptive effects of § 14501(c)(1) are limited. Justice Scalia explained that this provision preempts the authority of political subdivisions only with respect to a state's ability "to regulate 'a price, route, or service of any motor carrier . . . or any motor private carrier, broker, or freight forwarder *with respect to the transportation of property*'," and noted that "the italicized language massively limits the scope of preemption to include only laws, regulations, and other provisions that single out for special treatment 'motor carriers of property.'" *Ours Garage*, 536 U.S. at 449 (2002) (Scalia, J., dissenting) (emphasis in original). These additional clauses constrain the scope of the broad phrase "related to." The statute categorizes the phrase "transportation" into two distinct groups relevant to this issue: "equipment of any kind related to the movement of

property" and "services related to that movement * * *." 49 U.S.C. § 13102(23).

In this situation, there is a disconnect between the language of § 14501(c)(1) and Petitioner's actions. The expansive nature of both the phrase "related to" and the statutory definition of "transportation" are nevertheless limited to a concept encapsulated within the very essence of § 14501(c)(1): the movement of property. Petitioners state that the law allows them to do with Mr. Pelkey's car as they see fit—before, during, or after they have performed their job. This interpretation of the statute contradicts its plain reading.

Taking a broad view of "transportation", § 14501(c)(1) is still limited, because regulations on movement must relate to a "price, route, or service." Towing companies engage in a range of different conduct. Certainly not all towing company conduct is related to the act of towing. It is difficult, however, to see how a towing company could classify the deceptive sale of nonconsensually towed cars as a "service." Despite the broad scope of § 14501(c)(1), deceptive sales could not have been a "service" that Congress contemplated.

The relevant New Hampshire statute which respondent uses does not focus on the movement of property, but rather the methods by which a towing company may recover costs. *See* N.H. REV. STAT. ANN. §§ 262, 358-A:2; *Pelkey v. Dan's City Used Cars, Inc.*, 44 A.3d 480, 492-93 (N.H. 2012). In order to be preempted, these methods must be related to a

service provided by Petitioner in their towing capacity. When Petitioner forces the sale of a nonconsensually towed vehicle within the New Hampshire market, it has moved beyond the scope of "transportation" as used in § 14501(c)(1). To the extent petitioner is using any "equipment related to the movement of property," such use ceases at the end of the tow. Petitioner is not performing a "service related to the movement of property" since the movement that involves a towing company is simply towing. The towing performed by the company is the extent of any "service" that is provided. The sale of the car is only to allow the towing company to pay for garageman's liens against the vehicle. In essence, this sale only serves Petitioner's financial interest, at Respondent's expense.

Tow truck companies have a right to go about their business with minimal interference from state government, but this protection is limited to the activities involved in the specific movement of property. In this case, the sale arose after Petitioner had performed its function as a towing company and moved the car. To rule that such behavior falls within the scope of § 14501(c)(1) would distort the effect of the statute to favor deceptive and predatory behavior within the towing industry. It could not have been Congress' intent to create such a system. Therefore, this Court must respect the language of § 14501(c)(1), and require that the Petitioner follow the law of the State of New Hampshire.

III. DEALING WITH ABUSIVE TOWING PRACTICES NECESSITATES LOCAL REGULATION

Incidences of predatory towing show a need for regulation of towing practices. Such regulation is most effective when it originates from the communities where predatory conduct is common. A ruling that such regulations are preempted would frustrate such efforts and the federal government is incapable of relieving this burden.

A. Deregulation Should Not be Broadly Interpreted.

Examining the state of transportation industries since passage of the Interstate Commerce Commission Termination Act ("ICCTA") of 1995 reveals that systematic deregulation has had harmful unintended consequences. Paul Stephen Dempsey, *The Rise and Fall of Interstate Commerce Commission: The Tortuous Path from Regulation to Deregulation of America's Infrastructure*. 95 MARQ. L. REV. 1151, 1187 (2012). For example, former American Airlines CEO Bob Crandall noted "[t]hree decades of deregulation have demonstrated that airlines have special characteristics incompatible with a completely unregulated environment." Crandall further explained that "experience has established that market forces alone cannot and will not produce a satisfactory airline industry, which clearly needs some help to solve its pricing, cost and operating problems." *Id.* at 1187–88.

The power, banking, and financial industries have also suffered from deregulation. The banking and financial industries were not saved through deregulation, but only with large taxpayer funded bailouts following the subprime mortgage crisis. *Id.* at 1188. This Court should not extend deregulation further without clear Congressional language. *See infra* Part II.

B. The Federal Government is Incapable of Properly Addressing Abusive Towing Practices.

Professor Bernard Schwartz asserts that the administrative process is often less efficient than the judicial process it was initially implemented to aid, despite the notion that administrative agencies are often established to dispense "cheap and inexpensive justice by experts." BERNARD SCHWARTZ, ADMINISTRATIVE LAW 26 (2d ed. 1984). The federal government has shifted from regulation to deregulation over the past few decades, depending on public perception of whether regulation succeeded. Dempsey at 1177.

For example, though the Interstate Commerce Commission ("ICC") was considered efficient for many years, ICCTA terminated it after critics attacked its failure to follow statutory mandates. *Id.* at 1171, 1181–82. ICCTA has now left the towing industry in a situation that pre-1995 courts would have found incomprehensible. Dan Casey Stinnett, *The Trouble with Tow Trucks: Federal Preemption of State Law Claims Against Tow Truck Companies*, 8

J. TEX. CONSUMER L. 26, 27, *available at* http://www.jtexconsumerlaw.com/V8N1pdf/V8N1tow.pdf. To preempt state laws, as one court stated, would be to leave the towing industry "free from any regulation by federal, state or local government." *Id.* (quoting *Giddens v. City of Shreveport*, 901 F. Supp. 1170, 1183 (W.D. La. 1995)). However, following Congress' termination of the ICC, courts have frequently struck down numerous state regulations by interpreting ICCTA as a mandate that such state regulations be preempted. *See Harris Cnty. Wrecker Owners for Equal Opportunity v. City of Houston*, 943 F. Supp. 711 (S.D. Tex. 1996) (striking down a city wrecker ordinance despite the city's argument that towing was exempted from federal regulation under 49 U.S.C. §§ 13506(b)(1), (3)). This cannot have been Congress' purpose.

C. State and Local Governments are Best Equipped to Deal with Abusive Towing Practices.

To be truly responsive to local needs and circumstances, States should be given greater freedom to regulate trespass tows. The limited allowances for regulation needlessly raise the preemption question in an already complicated regulatory landscape. A May 2007 study mandated under the Safe Accountable Flexible Efficient Transportation Equality Act: a Legacy for Users ("SAFETEA-LU") and conducted by the U.S. Department of Transportation recommended that federal preemption be removed to allow for safety

regulations that would improve the current system, per the requests of representatives from the towing industry, while also further protecting consumers. John A. Volpe Nat'l Transp. Sys. Ctr. Motor Carrier Safety Div., *Report to Congress on the 'Review of Federal and State Laws Regarding Vehicle Towing'*, at 34, *available at* http://ntl.bts.gov/lib/42000/42800/42819/Predatory_Towing_Final_Report_to_Congress.pdf [hereinafter "Report"].

Indeed, the Towing and Recovery Association of America ("TRAA"), representing the interests of the towing industry, has stated it would prefer no reexamination or refinement of preemption law. Report at 28. Rather, they would prefer that federal law be amended to allow States to regulate trespass tows without reservation, such that federal law would "*remove the ambiguity about Federal preemption* once and for all." *Id.* (emphasis in original). Because towers have abided by "strict State or local laws that have fully regulated private trespass towing for years," granting States such regulatory power would not unduly burden or further confuse towers, who find the "hoopla over [preemption]" more confusing. *Id.*

The study further recommended that, because state practices vary state by state, delegating regulatory power to state legislatures for more focused regulation would be preferable to leaving this issue to Congress. Report at 15, 35. Motorist concerns over nonconsensual towing would also be addressed by delegating power to States. The study notes that with more state regulations in place,

consumers would not find themselves in the "Catch-22 position" whereby State courts, contrary to a plain reading of § 14501(c)(1), would throw out nonconsensual towing cases on preemption grounds, but then deny motorists compensation at the federal level. Report at 35. This Court should not endorse the decisions of the lower courts that would continue this injustice.

Congress' purpose in passing § 14501(c)(1) was not to give towing companies the choice of which state laws to follow and which to disregard. To ensure justice for victims of illegal tows, such dispositions must remain regulated at the state and local level.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of New Hampshire should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

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No. 12-52

In the Supreme Court of the United States

DAN'S CITY USED CARS, INC. D/B/A DAN'S CITY AUTO BODY,

Petitioner,

v.

ROBERT PELKEY,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW HAMPSHIRE

BRIEF OF *AMICI CURIAE* LOUISIANA, NEW HAMPSHIRE, AND 20 OTHER STATES IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether 49 U.S.C. §14501(c)(1), which prohibits states from enacting or enforcing "a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier," preempts negligence and consumer-protection-law claims by a vehicle owner against a towing company that disposed of his vehicle.

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INTEREST OF AMICI CURIAE

The amici States have a compelling interest in protecting their citizens from negligent or fraudulent conduct and in providing a remedy in the event such conduct occurs. The preservation of our authority to enforce laws in furtherance of those state goals is therefore of paramount importance. The states' interest is heightened even more in areas of law that have been historically or traditionally left to the states. The regulation of private property rights and the enforcement of general civil tort laws are two such areas.

This case is particularly important because if the state laws at issue are invalidated, the balance of authority between federal and state interests in this area will be skewed in a way that Congress never intended, and citizens will be left without a remedy for negligent or fraudulent conduct by towing companies. The amici states therefore urge the Court to affirm the decision of the New Hampshire Supreme Court that the state laws at issue are not preempted by the Federal Aviation Administration Authorization Act of 1994 (FAAAA), Pub. L. No. 103-305, 108 Stat. 1605-1606.

STATEMENT

Respondent Robert Pelkey was bedridden with a serious medical condition in February 2007 when his apartment complex had petitioner Dan's City Used Cars tow his car from the parking lot. Although legally parked, the car was towed without Mr. Pelkey's

knowledge in accordance with a policy that required tenants to move their cars during snowstorms.

Mr. Pelkey was hospitalized for almost two months after his car was towed. During that time, Dan's City began the process of attempting to dispose of the car pursuant to a New Hampshire law that allowed the custodian of a vehicle that had been removed and stored to sell or dispose of it if it went unclaimed for 30 days and the custodian followed certain notice and approval requirements. See N.H. Rev. Stat. Ann. 262.36-a, 262.37 (2007).

When Mr. Pelkey returned home after his discharge from the hospital, he discovered that his car had been towed and scheduled to be sold at public auction in two days. Mr. Pelkey's attorney contacted Dan's City to advise of the circumstances and make Dan's City aware that Mr. Pelkey had not "abandoned" his car and in fact wanted it back. Dan's City nonetheless attempted unsuccessfully to sell the car at auction. Some weeks later, after having told Mr. Pelkey's attorney that the vehicle had been sold at auction, Dan's City traded the vehicle to a third party.

Mr. Pelkey filed suit in state court alleging that Dan's City's actions were deceptive in violation of the New Hampshire Consumer Protection Act, N.H. Rev. Stat. Ann. 358-A:2, and breached other statutory and common law duties, such as the duty to use reasonable care in disposing of his vehicle.

The superior court granted summary judgment to Dan's City on those claims, finding them preempted

by the FAAAA. Pet. App. 23-33. The New Hampshire Supreme Court reversed based (among other reasons) on its conclusion that "[t]he 'service' of a towing company is the moving of vehicles"; "[t]he manner in which a towing company may auction another person's property to collect on a debt relates to post-service debt collection—an area of the company's affairs falling well outside its service of towing vehicles." Pet. App. 17.

INTRODUCTION AND SUMMARY OF ARGUMENT

This should be a simple case. The FAAAA preempts state laws "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. §14501(c)(1). The state-law claims at issue pertain to a towing company's disposal of cars it has already towed—which occurs after the conclusion of the "service" the towing company provides its customer. State laws relating to the disposal of another person's property, or even "removed" vehicles specifically, see N.H. Rev. Stat. Ann. 262:36-a, do not directly regulate or reference a towing company's "service" to its customer; and they do not have a significant impact on that service, regardless of any effect they may have on the company's bottom line. See Resp. Br. 14-23.

To overcome this, Dan's City relies on the phrase "related to," and attempts to use it as a springboard through which to override all state laws relating to the disposal of another person's property as applied to towing companies. This Court has seen such efforts before. In the ERISA context, employers, in-

surance companies, and benefit plans argued that ERISA's preemption provision overrode myriad state laws that were far afield from the types of laws Congress thought it was displacing when it enacted the statute. Through a series of cases, this Court imposed necessary limits on the scope of ERISA preemption, ensuring that traditional state laws did not fall merely because they had an impact on ERISA plan decisions or costs. The Court's application of ERISA's "related to" preemption provision sheds light on how the FAAAA's similarly phrased preemption provision should be applied—and supports Mr. Pelkey's arguments for why his claims are not preempted.

In its pathbreaking decision in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995), the Court explained that ERISA could not possibly preempt every state law that literally had a "relation to" ERISA benefit plans. The Court therefore held that preemption should be assessed by using "the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive" and the nature and effect of the state law on ERISA plans. *Id.* at 656, 659. Applying that approach, the Court held that ERISA did not preempt a New York statute that imposed surcharges on patients covered by commercial insurers, but not on patients covered by Blue Cross/Blue Shield—even though the statute influenced ERISA plans' decisions on a fundamental matter and raised their costs. In two subsequent cases, *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316 (1997), and *De Buono v.*

NYSA-ILA Medical and Clinical Services Fund, 520 U.S. 806 (1997), the Court applied that approach to uphold a state law dealing with prevailing wages and apprenticeship training standards and a state tax on medical facilities as applied to a facility owned by an ERISA plan.

As explained in further detail below, these ERISA cases confirm that Mr. Pelkey's state-law claims based on Dan's City's disposal of his car are not preempted by the FAAAA. Specifically, they confirm that the claims do not reference or directly regulate towing companies' "services," and do not have a "significant impact" on towing services. They confirm that preempting Mr. Pelkey's claims would not advance the objectives of the FAAAA. And they confirm that the presumption against preemption applies and reinforces the conclusion that his claims are not preempted.

ARGUMENT

THE FAAAA DOES NOT PREEMPT MR. PELKEY'S STATE-LAW CLAIMS AGAINST DAN'S CITY USED CARS

I. This Court's ERISA Decisions Provide Guidance In Assessing When A State Law Is Displaced By a "Related To" Preemption Provision.

A. The ERISA decisions represent the Court's most sustained effort at applying "related to" preemption.

Construing a preemption provision that uses the phrase "related to" presents an immediate challenge "since, as many a curbstone philosopher has observed, everything is related to everything else." *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring). The phrase "related to" indicates that the preemption provision "has a broad scope," *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (internal quotation marks omitted), but the precise extent of its scope is not self-defining. Nor is the difficulty solved by declaring that a state law is preempted if it has "a connection with" the specified subject matter. "For the same reasons that infinite relations cannot be the measure of pre-emption, neither can infinite connections." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995).

In *Rowe v. New Hampshire Motor Transport Association*, 552 U.S. 364 (2008), the Court dealt with this concern by relying on certain principles set out in *Morales*, which interpreted the similar preemption provision in the Airline Deregulation Act of 1978 (ADA). Specifically, the Court found that *Morales* established the following:

- "'[s]tate enforcement actions having a connection with, or reference to,' carrier 'rates, routes, or services' are preempted";

- "such pre-emption may occur even if a state law's effect on rates, routes, or services 'is only indirect'";

- "it makes no difference whether a state law is 'consistent' or 'inconsistent' with federal regulation";

- "pre-emption occurs at least where state laws have a 'significant impact' related to Congress' deregulatory and pre-emption related objectives," which are "helping ensure transportation rates, routes, and services that reflect 'maximum reliance on competitive market forces'"; and

- "federal law might not pre-empt state laws that affect fares in only a 'tenuous, remote, or peripheral manner.'" *Rowe*, 552 U.S. at 370-71 (quoting *Morales*, 504 U.S. at 378, 384, 386-87, 390).

This Court had little difficulty applying those standards in its previous cases. *Morales* found it "clear" that the NAAG Guidelines had "the forbidden significant effect upon fares." 504 U.S. at 388. And *Rowe* found that the Maine law was effectively com-

manding what services motor carriers must provide in the course of delivering their customers' packages. 552 U.S. at 371-72. Mr. Pelkey's brief demonstrates that it is equally "clear" that Mr. Pelkey's claims do *not* have "the forbidden significant effect upon [services]." See Resp. Br. 14-23. Recognizing, however, that clarity is often in the eye of the beholder, we believe support for Mr. Pelkey's position also comes from an additional source.

This Court has decided a series of cases that provide important insights in addressing "related to" preemption provisions. Specifically, between 1981 and 1997 the Court decided 16 cases involving "[t]he boundaries of ERISA's pre-emptive reach." *De Buono v. NYSA-ILA Medical and Clinical Services Fund*, 520 U.S. 806, 808-09 n.1 (1997). Moreover, in *Travelers* the Court expressly recognized the challenges of construing a "related to" preemption provision and set about developing a workable approach—one that it applied there and in several later cases. Our goal is not, of course, to import the complexity of ERISA jurisprudence into FAAAA jurisprudence. Rather, it is merely to take advantage of markers already planted by this Court.

Looking to the ERISA preemption cases also makes eminent sense because *Morales* relied on ERISA preemption decisions in developing its approach to ADA preemption. See *Morales*, 504 U.S. at 383-87; *id.* at 384 (rejecting argument that Court should "not use [its] interpretation of identical language in ERISA as a guide"). That *Travelers* refined ERISA preemption doctrine after *Morales* and after Congress enacted the FAAAA is of no moment. None

of the preemption guidelines established in *Morales* and followed in *Rowe* are inconsistent with *Travelers*. To the contrary, in emphasizing that the inquiry should focus on Congress's "pre-emption related objectives," *Rowe* embraced one of *Travelers*' principal teachings: that the Court "must go beyond the unhelpful text and the frustrating difficulty in defining its key term, and look instead to the objectives of the . . . statute as a guide to the scope of state law that Congress understood would survive." *Rowe*, 552 U.S. at 371; *Travelers*, 514 U.S. at 656.

B. To further Congress's objectives, this Court has imposed careful limits when applying ERISA's "relates to" preemption provision.

ERISA's preemption provision declares that ERISA "shall supersede any and all State laws insofar as they . . . relate to any employee benefit plan" covered by the statute. 29 U.S.C. §1144(a). This Court's struggle with the provision began in 1981 when it decided *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), the first of the 16 cases catalogued in *De Buono*. The Court observed that lower courts were "reach[ing] various conclusions as to the meaning of ERISA's pre-emptive language" because the text "g[ave] rise to some confusion," particularly where the state law being challenged was directed at "a matter quite different from" ERISA plans. *Id.* at 523-24. The Court eventually adopted a workable framework that has resulted in there being only a handful of ERISA preemption cases over the past decade. And, as explained in §II, *infra*, the Court's application of that framework strongly supports the

conclusion that the FAAAA does not preempt state laws related to the disposal of property.

In *Travelers*, the Court described its decisions between 1981 and 1995 as establishing that "ERISA pre-empted state laws that mandated employee benefit structures or their administration" and "state laws providing alternative enforcement mechanisms." 514 U.S. at 658. Thus, for example, in *Alessi* the Court found preempted a New Jersey statute that prohibited ERISA pension plans from offsetting retirement benefits by the amount of any worker's compensation payments to which the employee was entitled. 451 U.S. at 525. See also *Shaw v. Delta Air Lines*, 463 U.S. 85 (1983) (holding that ERISA preempted a New York law that required employees, including those with ERISA plans, to pay benefits to employees disabled as a result of pregnancy).

In *Travelers*, the Court addressed for the first time the claim that ERISA preempted a state law because of its indirect effect on ERISA plans. The case involved a New York statute that required hospitals to collect surcharges (ranging from 9% to 13%) from patients covered by commercial insurers but not from patients insured by Blue Cross/Blue Shield. 514 U.S. at 650-51. "[S]everal commercial insurers, acting as fiduciaries of ERISA plans they administer, joined with their trade associations," alleged that ERISA preempted the surcharge statute because the surcharges "make the Blues more attractive . . . as insurance alternatives and thus have an indirect economic effect on choices made by insurance buyers, including ERISA plans." *Id.* at 651, 659. And that was not a choice about a minor matter: it went to

"an ERISA welfare plan's most basic administrative decision: how best to provide plan members with health care coverage." Brief for Respondents The Travelers Insurance Co. at 18, *Travelers*, 514 U.S. 645 (Nos. 93-1408, 93-414, 93-1405) ("Travelers Br.").

The Court unanimously held that ERISA did not preempt the surcharges. The Court established a two-step analytical framework that required consideration of "the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive" and the nature of the effect of the state law on ERISA plans. 514 U.S. at 656, 659. As to the former inquiry, the Court explained that "[t]he basic thrust of the pre-emption clause . . . was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." *Id.* at 657. The New York surcharge statute did not undermine that objective, for "[a]n indirect economic influence . . . does not bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself. . . . Nor does the indirect influence of the surcharges preclude uniform administrative practice . . . ." *Id.* at 659-60.

At bottom, found the Court, "nothing in the language of the Act or the context of its passage indicates that Congress chose to displace general health care regulation, which historically has been a matter of local concern." *Id.* at 661. The Court therefore rejected the notion that the ERISA preemption provision would "displac[e] all state laws affecting costs and charges on the theory that they indirectly relate to ERISA plans that purchase health care coverage."

Ibid. Although ERISA might preempt a state law that "produce[s] such acute, albeit indirect, economic effects . . . as to force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers," the New York statute was not such a law. *Id.* at 668.

The Court applied this analysis in two cases decided two years later. In *Dillingham*, the Court upheld a California prevailing-wage statute that allowed a contractor to pay a lower wage to workers in a state-approved apprenticeship program. 519 U.S. at 319. A company with an apprentice training committee that constituted an "employee welfare benefit plan" within the meaning of ERISA alleged that ERISA preempted the California statute. This Court disagreed, finding the subjects of public works wages and apprentice training standards "quite remote" from the subject matter with which ERISA was concerned, and noting that nothing in ERISA or its legislative history indicated that Congress intended to preempt state apprenticeship training standards. *Id.* at 330-331. The Court further found that the statute had no forbidden effect on ERISA plans: it did not "bind them to anything"; at most it provided only an "economic incentive" for compliance with the prevailing wage law. *Id.* at 332.

Finally, in *De Buono* the Court upheld a New York statute that imposed a tax on gross receipts of income of medical facilities, including facilities owned and operated by ERISA plans. 520 U.S. at 809. The Court "not[ed] that the historic police powers of the State include the regulation of matters of health and safety," and found that "[t]here is nothing

in the operation of the [New York law] that convince us it was the type of state law that Congress intended ERISA to supersede." *Id.* at 814. In particular, the Court explained that if the ERISA plan had chosen to purchase medical benefits from a hospital, the New York tax would have imposed "indirect" costs on it—costs that "would be in all relevant respects identical to the 'direct' impact felt here." *Id.* at 816. "Thus," held the Court, "the supposed difference between direct and indirect impact . . . cannot withstand scrutiny." *Ibid.*

II. Consistent With Those Decisions, State Laws Pertaining To A Towing Company's Disposal Of Towed Cars Do Not "Reference," "Directly Regulate," Or Have a "Significant Impact" On The "Services" Towing Companies Provide Their Customers.

Mr. Pelkey alleges that, in disposing his car, Dan's City engaged in deceptive acts that violated the New Hampshire Consumer Protection Act and breached statutory and common-law duties the company owed him. In assessing whether the FAAAA preempts those claims, the necessary starting point is defining the "service" a towing company provides. A towing company's "service" is what it provides its customer, here, Colonial Village, the owner of Mr. Pelkey's apartment complex. It is, at most, the "bargained-for provision of labor." Resp. Br. 22 (quoting *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995) (en banc)). The sale or other disposal of a (purportedly) unclaimed towed car is not part of that service.

Colonial Village had no interest in, and presumably no knowledge of, what Dan's City did with Mr. Pelkey's car once it was towed. The "services" Dan's City provided Colonial Village—the actual towing of the vehicle off the latter's premises at its request—had been concluded long before Dan's City began trying to auction off Mr. Pelkey's car. A towing company does not sell or trade a towed car as a service to its customer, much less as a service to the car's owner. The actions forming the basis of Mr. Pelkey's claims resulted not from any towing services to anyone, but rather from Dan's City's efforts under New Hampshire law to convert Mr. Pelkey's car into cash to benefit Dan's City and Dan's City alone.

Mr. Pelkey's brief, with only a few fleeting references to ERISA cases, persuasively explains why his state-law claims therefore do not directly regulate or expressly reference the "service" a towing company actually provides; and do not have a significant impact on that service. As we explain below, this Court's ERISA decisions reinforce that conclusion.

The New Hampshire laws at issue do not "reference" towing companies' "services." It is not clear whether Dan's City contends that the state-law claims at issue are preempted because they "reference" towing services. This Court's cases show that they do not. The Consumer Protection Act and negligence claims both arise under laws of general applicability. The Consumer Protection Act broadly makes it unlawful to use deceptive acts "in the conduct of any trade or commerce," N.H. Rev. Stat. Ann. 358-A:2; and the duty of care imposed by the state's common law of negligence likewise broadly applies to

all persons who are the custodian of another person's property. Neither conceivably "references" towing "services." See *Dillingham*, 519 U.S. at 328.

Nor does his claim under Chapter 262 of the New Hampshire Code, which governs the disposal of "removed" vehicles, N.H. Rev. Stat. Ann. 262:36-a, "reference" towing "services." There is no reason to believe that all "removed vehicles" had previously been towed. And even if they had, the statute pertains to the vehicles' disposition, not the towing service itself. Cf. *Travelers*, 514 U.S. at 656 (surcharges do not "reference" an ERISA plan because they "are imposed upon patients and HMOs regardless of whether the commercial coverage or membership, respectively, is ultimately secured by an ERISA plan").

State disposal laws do not directly regulate towing services. Dan's City's principal contention is that the disposal of vehicles are part and parcel of the "services" towing companies provide, and that a state regulation of disposal is therefore a forbidden direct regulation of motor carrier "services." Pet. Br. 29, 30, 34-36. As discussed above, a towing company does not sell or trade an unclaimed towed vehicle as a service to its customer. The most that Dan's City can say, therefore, is that "services" within the meaning of §14501(c)(1) includes "activities that are incidental and distinct from the actual transportation services." Pet. Br. 34. That concedes the point.

The regulation of an activity that is not a "service" might have an "acute" or "significant" enough impact to be preempted by the FAAAA. (We address

that basis for preemption next.) But by definition it is not the *direct* regulation of the service itself. Dan's City relies on *Rowe*, but the Maine statutes at issue required a motor carrier to "follow[ ] particular delivery procedures" if it wished to ship products for tobacco retailers. 552 U.S. at 372. Suffice to say, delivering goods is the basic "service" provided by motor carriers. What a motor carrier does *after* it provides its service (there, delivery, here, towing) is a different matter altogether.

The ERISA cases support this conclusion. Indeed, the state laws involved here are even more attenuated from FAAAA "services" than the patient surcharge and gross receipts tax at issue in *Travelers* and *De Buono* were to ERISA plans. The state laws at issue there provided "incentives" to ERISA plan administrators, but were not preempted because they did not *dictate* "employee benefit structures or their administration." 514 U.S. at 658. The case against preemption is stronger here, where the New Hampshire laws do not even pertain to the actual service towing companies provide their customers. To be sure, the laws regulate towing companies (among others). But *De Buono*—which held that a state tax on medical facilities, including those run by ERISA plans, is not preempted—confirms that "related to" preemption requires more.

State disposal laws do not have a "significant impact" on towing services. Dan's City contends that state disposal laws have a forbidden "significant impact" on towing services because they "would directly impact the prices and services of tow truckers" and "would subject tow truck drivers to the

vagaries of each state's law." Pet. Br. 36, 37. The ERISA cases conclusively refute that contention.

The state laws upheld against preemption challenges in *Travelers* and *De Buono* directly raised the costs incurred by ERISA plans. The New York statute in *Travelers* imposed significant surcharges on insurance plans purchased by many ERISA plans; and the New York gross receipts tax in *De Buono* directly raised the costs of operating hospitals run by ERISA plans. The Court in *De Buono* could not have been clearer: "Any state tax, or other law, that increases the cost of providing benefits to covered employees will have some effect on the administration of ERISA plans, but that simply cannot mean that every state law with such an effect is preempted by federal statute." 520 U.S. at 816. Even if New Hampshire laws related to the disposal of cars increase Dan's City's costs, and thereby affect its services, FAAAA preemption does not follow.

Dan's City's "vagaries of each state's law" argument fares no better. Indeed, The Travelers Insurance Company made precisely that argument in *Travelers*, asserting that "[a]llowing states to alter the relative costs of different types of benefit payors would thus require plans to tailor[ ] their plans to the peculiarities of the law of each jurisdiction, thereby thwarting Congress's goal of nationwide uniformity." Travelers Br. 23. Rejecting Travelers' argument, the Court ruled that "cost uniformity was almost certainly not an object of pre-emption, just as laws with only an indirect economic effect on the relative costs of various health insurance packages in a given State are a far cry from those 'conflicting

directives' from which Congress meant to insulate ERISA plans." 514 U.S. at 662.

At bottom, Dan's City's "vagaries of each state's law" argument begs the question. Congress intended to shield towing companies from varying state laws only as they relate to towing "services." Congress did not intend to shield towing companies from varying state laws outside that preempted area. And as explained above, the disposal of removed cars is outside the area covered by §14501(c)(1).

A final word on the impact of New Hampshire's laws on Dan's City: Mr. Pelkey's claims arise in part out of the same state law that Dan's City invoked in disposing of Mr. Pelkey's vehicle in the first place. Absent that state law, Dan's City had no right to sell or trade Mr. Pelkey's car at all. If the state laws giving Dan's City that right are not preempted, neither are state-law claims based on Dan's City's failure to comply with those laws. What's sauce for the goose is sauce for the gander.

Preempting Mr. Pelkey's claims would not advance the objectives of the FAAAA. As noted, *Rowe* stated that the FAAAA preemption inquiry should focus on Congress's "pre-emption related objectives"—which reflects *Travelers*' ruling that the Court should look "to the objectives of the . . . statute as a guide to the scope of state law that Congress understood would survive." *Rowe*, 552 U.S. at 371; *Travelers*, 514 U.S. at 656. The Court's application of that approach in its ERISA cases illuminates how it supports Mr. Pelkey here.

Travelers found that "[t]he basic thrust of [ERISA's] pre-emption clause . . . was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit systems." 514 U.S. at 657. Uniformity in plan administration does not require, however, uniformity in all state laws that "influence" a plan's administration or that "bear[ ] on the costs of benefits." *Id.* at 660. Moreover, viewing plan administration too expansively would have effects that Congress is unlikely to have intended, such as "displac[ing] general health care regulation, which historically has been a matter of local concern." *Id.* at 661. See also *ibid.* (finding it also doubtful that Congress would have intended to preempt other categories of state law that indirectly affect ERISA plan costs, such as "[q]uality control and workplace regulation"). *Dillingham* reached the same conclusion with respect to "wages to be paid on public works projects and the substantive standards to be applied to apprenticeship training programs," finding them to be "quite remote from the areas with which ERISA is expressly concerned." 519 U.S. at 330.

Nothing in the objectives or purpose of the FAAAA indicates that Congress intended or expected to preempt state law remedies for tortious conduct related to the disposal of cars. Congress sought to deregulate the "price, route, or service" or motor carriers in response to barriers states had imposed on the interstate market, such as entry controls that stifled competition by protecting certain carriers and burdening potential new carriers. See H.R. Conf. Rep. No. 103-677, at 86, *reprinted in* 1994 U.S.C.C.A.N. 1715, 1758. State laws addressing the

disposal of property—including laws barring deceptive or negligent behavior during the course of disposal—are "remote" from those concerns. In short, "nothing in the language of the Act or the context of its passage indicates that Congress chose to displace [state laws relating the disposal of property], which historically has been a matter of local concern." *Travelers*, 514 U.S. at 661.

The presumption against preemption supports finding that Mr. Pelkey's claims are not preempted. Construing §14501(c)(1) as not preempting the New Hampshire laws comports with the longstanding "assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008). The disposition of abandoned property is undoubtedly a field that "has been traditionally occupied by the States." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Dan's City "therefore bear[s] the considerable burden of overcoming 'the starting presumption that Congress does not intend to supplant state law.'" *De Buono*, 520 U.S. at 814 (quoting *Travelers*, 514 U.S. at 654). It has not met that burden.

Dan's City asserts that the presumption does not apply because state disposal-of-property laws do not pertain to "health and safety" and because this case involves an express preemption provision. The ERISA cases once again refute his contentions. *Dillingham* applied the presumption to a state law addressing "apprenticeship standards and the wages paid on state public works." 519 U.S. at 330. Because

laws of that sort—which are not health and safety laws—"have long been regulated by the States," the Court applied its "ordinary assumption that the historic police powers of the States were not to be superseded by the Federal Act." *Id.* at 331 (internal quotation marks omitted).

The Court has repeatedly applied the presumption in interpreting ERISA's express preemption provision, confirming the error of Dan's City's contention that the preemption does not apply in express preemption cases. See *De Buono*, 520 U.S. at 814; *Dillingham*, 519 U.S. at 331; *Travelers*, 514 U.S. at 654. And the Court recently confirmed that the presumption applies in express preemption cases. *Altria Group*, 555 U.S. at 77 ("when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption") (internal quotation marks omitted).

As explained above, §14501(c)(1) is best read as not preempting state laws related to the disposition of automobiles. At the very least, §14501(c)(1) does not express a clear intent to preempt such laws and therefore does not overcome the presumption against preemption.

CONCLUSION

The judgment of the New Hampshire Supreme Court should be affirmed.

Respectfully submitted,

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Dated: FEBRUARY 2013

AMICUS CURIAE BRIEF

No. 12-52

In the

Supreme Court of the United States

DAN'S CITY USED CARS, INC.
D/B/A DAN'S CITY AUTO BODY,
Petitioner,

v.

ROBERT PELKEY,

Respondent.

On Writ of Certiorari To The
Supreme Court of New Hampshire

Motion for Leave to File and Brief For Massachusetts Jobs With Justice as Amicus Curiae Supporting Respondent

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MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT

Pursuant to Rule 37 of the Rules of this Court (S Ct 37), Massachusetts Jobs With Justice respectfully moves the Court for leave to file an *amicus curiae* brief in the above-entitled case. Counsel for respondent has consented to the filing of this brief and written consent has been filed with the Clerk of the Court; counsel for petitioner has withheld consent.

STATEMENT OF INTEREST OF MASSACHUSETTS JOBS WITH JUSTICE

Massachusetts Jobs With Justice is a coalition of more than one hundred community, labor, student and faith organizations that seeks to educate and mobilize the public on issues of workers' rights. The organization has supported national claims brought by skycap employees against several airlines challenging the airlines' deceptive imposition of a $2 per bag charge for curbside check-in which passengers mistook for skycaps' tips and caused devastating injury to the skycaps' income. Two of these cases brought by skycap employees are currently on appeal to the First Circuit. They will address the question of whether common law claims are preempted by the Airline Deregulation Act ("ADA"), 49 U.S.C. § 41713. The Federal Aviation Administration Authorization Act ("FAAAA"), 49 U.S.C. § 14501(c)(1), the Act at issue in this case, was enacted for similar purposes as the ADA and contains a nearly identically worded preemption clause.

In this brief, amicus seeks to present to the Court further argument supporting the conclusion that the FAAAA does not preempt all the claims at

issue in this case, in particular common law claims. Both the ADA and the FAAAA contain preemption clauses that prevent a State from enacting or enforcing "a law, regulation, or other provision having the force and effect of law..." 49 U.S.C. § 14501(c)(1); 49 U.S.C. § 41713. Amicus contend that, based on statutory analysis and an examination of Congressional intent, this preemption clause does not apply to common law. The argument presented in this brief is consistent with the Court's interpretation of preemption clauses in other federal statutory schemes.

For these reasons, Massachusetts Jobs With Justice respectfully requests that the Court grant leave to file this brief.

February, 2013

Respectfully submitted,

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INTEREST OF AMICUS CURIAE[1]

Massachusetts Jobs With Justice is a coalition of more than one hundred community, labor, student and faith organizations that seeks to educate and mobilize the public on issues of workers' rights.

Massachusetts Jobs With Justice has supported national claims brought by skycap employees against several airlines challenging the airlines' deceptive imposition of a $2 per bag charge for curbside check-in which passengers mistook for skycaps' tips and caused devastating injury to the skycaps' income. Currently on appeal to the First Circuit in two of these cases brought by skycap employees is the question of whether common law claims may be preempted by the Airline Deregulation Act ("ADA"), 49 U.S.C. § 41713(b)(1). See Brown v. United Airlines, No. 12-1543 (1st Cir. pending); Mitchell v. US Airways, No. 12-2056 (1st Cir. pending). Given that this case now pending before the Court may touch upon the question of whether common law claims, as well as a statutory claim, are preempted by the nearly identical preemption provision in the Federal Aviation Administration Authorization Act ("FAAAA"), 49 U.S.C. § 14501(c)(1), amicus seeks to present to the

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[1] Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus and its counsel made a monetary contribution to its preparation or submission. The respondent's letter consenting to the filing of this brief has been filed with the Clerk's office in conjunction with the certificate of service. Because the petitioner has withheld consent, amicus has filed a motion for leave to file this brief.

Court further rationale for why common law claims do not fall within the statute's preemptive scope.

Thus, Massachusetts Jobs With Justice submits this brief in order to offer an further argument supporting the conclusion that the FAAAA does not preempt the common law claims in this case. That is because the FAAAA, based on the preemptive language of the statute, does not preempt common law claims; instead, its preemptive scope is limited to positive law enactments. This brief is limited to the question of whether common law is "a law, regulation, or other provision having the force and effect of law" within the meaning of the FAAAA's preemption provision. This brief seeks to provide a statutory analysis of the FAAAA's preemption provision that is consistent with the Court's analysis of preemption clauses in other federal statutory schemes.

BACKGROUND AND SUMMARY OF ARGUMENT

This case involves an interpretation of the preemptive scope of 49 U.S.C. § 14501(c)(1), the FAAAA. Although this case specifically addresses the tort liability of a towing company, the Court's decision will have an impact on the general understanding of the preemptive scope of the FAAAA, along with the preemptive scope of a similar statute that has been interpreted in tandem with the FAAAA, namely the ADA, 49 U.S.C. § 41713. The Supreme Court of New Hampshire found that neither of the plaintiff's claims was preempted by the FAAAA because the claims were not sufficiently related to the towing company's "service" or to

"transportation of property." However, the Court should also consider whether the FAAAA's preemption provision even extends to common law claims. A preemption analysis should begin with the statutory preemption language itself, and the FAAAA's preemption clause provides only that "a State, political subdivision of a State, or political authority of at least 2 or more States may not enact or enforce *a law, regulation, or other provision having the force and effect of law* related to a price, route, or service of any motor carrier..." 49 U.S.C. § 14501(c)(1) (emphasis added). Through this language, Congress established that FAAAA preemption would be limited to positive state enactments and would not extend to common law. This interpretation is consistent with the Court's analysis of preemption clauses in other federal statutory schemes.

The Supremacy Clause of the United States Constitution empowers Congress to preempt state law "by enacting a statute containing an express preemption provision." Arizona v. United States, 132 S. Ct. 2492, 2500-01 (2012). However, "[f]ederalism, central to the constitutional design, adopts the principle that both the National and State governments have elements of sovereignty the other is bound to respect." Id. at 2500. Thus, in preemption analysis, courts should assume that the States' historic police powers are not superseded "'unless that was the clear and manifest purpose of Congress.'" Id. at 2501.

Furthermore, this Court has repeatedly established that common law preemption should only be found where there is explicit language

indicating such intent. For instance, in United States v. Texas, 507 U.S. 529 (1993), the Court concluded that the federal Debt Collection Act, 7 U.S.C. § 2011, et seq., did not abrogate the United States' common-law right to collect prejudgment interest on debts owed by the States. In reaching this conclusion, the Court acknowledged the "longstanding...principle that '[s]tatutes which invade the common law...are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is present.'" Id. at 534 (quoting Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952)). The Court further held that "[in] order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." Id. The Second Circuit made a similar argument in Matter of Oswego Barge Corp., noting that "Congress is less likely to have intended preemption of 'long-established and familiar principles' of 'the common law...'" 664 F.2d 327, 339 (2d Cir. 1981).

Because "'the purpose of Congress is the ultimate touchstone' of pre-emption analysis," the Court must first and primarily focus on the language of the preemption clause. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516-17 (1992); see also Medtronic, Inc. v. Lohr, 518 U.S. 470, 486 (1986) ("Congress' intent...primarily is discerned from the language of the pre-emption statute..."); see also generally Zuni Pub. School Dist. No. 89 v. Dept. of Educ., 550 U.S. 81, 93 (2007) ("[I]f the intent of Congress is clear and unambiguously expressed by

the statutory language at issue, that would be the end of the analysis.").

The FAAAA's preemption clause states as follows:

> Except as provided in [this subsection], a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce ***a law, regulation, or other provision having the force and effect of law*** related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

49 U.S.C. § 14501 (emphasis added).

As explained in detail below, the FAAAA's preemption clause does not extend to claims brought pursuant to state common law. Indeed, that is clearly not what Congress intended, in light of the language it chose to use. If Congress had intended the FAAAA to preempt common law claims as well as claims arising under positive enactments, it could have done so by explicitly listing "the common law," see, e.g., 17 U.S.C. § 301(a), or by using other broader language, as it has done in other statutes. Finally, in light of the FAAAA's purpose of deregulating the trucking industry and avoiding diverse state "regulatory" schemes from

undermining that deregulation, finding preemption of common law claims under the FAAAA would contravene the purpose of the statute.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE FAAAA PREEMPTION CLAUSE DICTATES THAT THE STATUTE PREEMPTS ONLY POSITIVE STATE ENACTMENTS, NOT COMMON LAW.

As noted above, the FAAAA's preemption provision applies to three categories of state claims—those arising under: (1) "a law"; (2) "a...regulation"; or (3) "a[n]...other provision having the force and effect of law..." 49 U.S.C. § 14501(c)(1). As the Court recognized in Sprietsma v. Mercury Marine, the first two categories do not encompass common law. 537 U.S. 51, 63 (2002). In that case, the preemption provision at issue (part of the Federal Boat Safety Act) stated that "'a State or political subdivision of a State may not establish, continue in effect, or enforce ***a law or regulation*** establishing a recreational vessel or associated equipment performance...'" Id. at 58-59 (quoting 46 U.S.C. § 4306) (emphasis added). The Court held in Sprietsma that the phrase "law or regulation" did "not encompass[] common-law claims." Id. at 63. The Court cited two reasons for this conclusion:

> First, the article "a" before "law or regulation" implies a discreteness—which is embodied in statutes and regulations—that is not present in the

> common law. Second, because "a word is known by the company it keeps,"...the terms "law" and "regulation" used together in the pre-emption clause indicate that Congress pre-empted only positive enactments. If "law" were read so broadly so as to include the common law, it might also be interpreted to include regulations, which would render the express reference to "regulation" in the pre-emption clause superfluous.

Id. at 63.

The Court's conclusion in Sprietsma applies with equal force here. Certainly that holding applies to "a law" and "a...regulation" as stated in the FAAAA, as that is the exact language addressed by the Court in Sprietsma. Id. Moreover, for the same reasons articulated by the Court, that analysis must also apply to "a[n]...other provision having the force and effect of law..." First, the FAAAA's preemption provision refers to three distinct, separate categories of legal enactments, each modified by "a," which "implies a discreteness...that is not present in the common law." Id. at 63.[2] Additionally, as in

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[2] There can be no question that the modifier "a" applies to all three categories, as it is a basic principle of grammar and punctuation that the use of a series of three categories, all separated by commas, clearly indicates that those three categories are to be considered distinctly and all modified by "a" (as opposed to the first two categories being grouped together and the third category standing alone). See, e.g., In re Renshaw, 222 F.3d 82, 92 (2d Cir. 2000) ("[W]hen Congress wishes to indicate that a series of items is a set of alternatives,

Sprietsma, "[i]f 'law' were read so broadly so as to include the common law, it might also be interpreted to include regulations, which would render the express reference to 'regulation' in the pre-emption clause superfluous." Id. Precisely this same reasoning applies to the third category in the FAAAA's preemption clause; "other provision having the force and effect of law" would be rendered superfluous if "law" were read so broadly to include common law as well as other types of legal enactments.

Furthermore, as the Court recognized in Sprietsma, the three categories in the FAAAA's preemption clause are all "known by the company [they] keep." 537 U.S. at 63. Congress' language in the FAAAA's preemption clause—its use of three separate categories of laws—would have been an odd way to refer to common law. Congress chose to delineate three specific and separate categories of preempted state enactments, and it chose not to list "common law" among those categories.

Moreover, the doctrine of ejusdem generis dictates that the third term must be interpreted to be the same type of category as the first two terms. It would violate this canon of statutory interpretation for the last category on the list to be interpreted more broadly than the first two. See Norfolk & Western R. Co. v. Train Dispatchers, 499

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it consistently separates the items by commas and uses an 'or' before the last one."). It would make no sense grammatically for "a" to modify "law" and "regulation" but not "other provision having the force and effect of law," nor would it make grammatical sense for "law" to be modified by "a," but not "regulation" or "other provision having the force and effect of law."

U.S. 117, 129 (1991) ("[W]hen a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration."); 2A J. Sutherland, Statutes and Statutory Construction § 47.17 (C. Sands 4th ed. 1973) (where "general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words"); see also Washington State Dept. of Social & Health Servs. v. Ex rel Keffeler, 537 U.S. 371 (2003) ("[U]nder the established interpretative canons of noscitur a sociis and ejusdem generis, where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar to those enumerated by the specific words"). Thus, "other provision having the force and effect of law" should not be read to mean a far broader category of law, encompassing common law, where the first two terms refer only to positive law.

Further, under a plain-language reading of the statute, the phrase "other provision having the force and effect of law" cannot include common law, as common law is simply not a "provision" of law. Indeed, common law does not meet the Black's Law Dictionary definition of "provision": "a clause in a statute, contract, or other legal instrument." Black's Law Dictionary, 1262 (8th ed. 2004). Instead, "other provision having the force and effect of law" must refer to actual intentional enactments, such as agency rules or guidelines.

Other language in the FAAAA preemption clause confirms that it does not cover common law.

First, the statute lists three categories of entities—"a State, political subdivision of a state, or political authority of 2 or more States," § 14501(c)(1)—none of which would appear to mean courts, as opposed to legislative or regulatory bodies. Moreover, the statute speaks of affirmative pronouncements, in that it governs the "enact[ment and] enforce[ment]" of laws, regulations and other provisions. Id. On its face, this language does not appear to apply to judge-made common law. Courts do not "enforce" law; that role is for the executive branch. See, e.g., Stieberger v. Heckler, 615 F. Supp. 1315, 1356-57 (S.D.N.Y. 1985) (there are "three distinct branches of government with independently derived legal authority and substantially separate functions—the legislature, to ***enact*** the law; the judiciary, to interpret the law, and the executive (and its administrative agencies), to ***enforce*** the law.") (emphasis added). In contrast, the language of ERISA's preemption clause (discussed in more detail in Section II, infra) explicates that it includes decisional law issued by courts, defining "State law" to include, *inter alia*, "decisions" and "other State action." 29 U.S.C. § 1144. The FAAAA contains no such language and does not otherwise give any indication that its preemption clause applies to judicial decisions.

This Court has held that statutory language closely resembling that used in the FAAAA does not preempt common law claims. For instance, in Cipollone v. Liggett Group, Inc., the Court held that the Federal Cigarette Labeling and Advertising Act (FCLAA) of 1965, 15 U.S.C.A. § 1334, "is best read as having superseded only positive enactments by

legislatures or administrative agencies that mandate particular warning labels." 505 U.S. at 518-19. In the 1965 Act's preemption clause, "Congress spoke precisely and narrowly: 'No *statement* relating to smoking and health shall be required...'" Id. at 518 (emphasis in Cipollone). Accordingly, the Court's decision in Cipollone regarding the 1965 FCLAA, that it "is best read as having superseded only positive enactments by legislatures or administrative agencies..." id. at 518-19, applies here as well.

Furthermore, when interpreting the ADA, a statute with an almost identical preemption provision, 49 U.S.C. § 41713(b)(1), this Court has applied the preemption clause to enactments that quite clearly do fit into the definition of "other provision[s] having the force and effect of law," establishing that the term is not deprived of meaning if it excludes common law. For example, in Morales v. Trans World Airlines, Inc., the Court held that Travel Industry Enforcement Guidelines that had been established by the National Association of Attorneys General were preempted under the ADA, presumably as an "other provision having the force and effect of law." 504 U.S. 374, 391 (1992); see also Arapahoe County Pub. Airport Authority v. F.A.A., 242 F.3d 1213, 1222-23 (10th Cir. 2001) (holding that ban on air carrier service imposed by Arapahoe County Public Airport Authority was preempted under ADA); American Airlines, Inc. v. Dep't of Transp., 202 F.3d 788, 808 (5th Cir. 2000) (agreements between interstate air carriers and board of Dallas-Fort Worth regional airport preempted under ADA). These cases illustrate the

type of enactments that would fall into the category "other provision having the force and effect of law."

II. OTHER FEDERAL STATUTES CONFIRM THAT THE FAAAA'S PREEMPTION CLAUSE APPLIES ONLY TO POSITIVE LAW, NOT COMMON LAW.

The Court's decisions regarding the scope of preemption clauses in other statutory schemes further confirms that the FAAAA's preemption clause applies only to positive law enactments, not common law. First, it is quite clear that when Congress intends to include common law claims in the scope of a preemption clause, it can do so explicitly. For example, ERISA's preemption clause states that ERISA preempts "[a]ny and all State laws," 29 U.S.C. § 1144(a), and ERISA's preemption clause expressly defines "State law" as including "all laws, ***decisions***, rules, regulations, or other State action having the effect of law." 29 U.S.C. § 1144(c)(1) (emphasis added). As the Court has recognized, "the ERISA civil enforcement mechanism is one of those provisions with such 'extraordinary preemptive power' that it 'converts an ordinary state common law complaint into one stating a federal claim...'" Aetna Health, Inc. v. Davila, 542 U.S. 200, 209 (2004) (quoting Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 65-66 (1987)). Congress accomplished this "extraordinary preemptive power" quite simply, with the language "[a]ny and all State laws," 29 U.S.C. § 1144(a), and the specification that "State law" includes "decisions," 29 U.S.C. § 1144(c)(1),

inter alia. In light of this broader language Congress chose to use in ERISA, it reasonably can be assumed that Congress understands how to create an all-encompassing preemption clause, including decisional law. It chose not to go so far with the FAAAA, instead carefully enumerating only specific categories of positive law that were preempted.

Congress also knows how to include common law claims expressly within a preemption clause. In the Copyright Act, for instance, the preemption clause states: "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright...no person is entitled to any such right or equivalent right in any such work ***under the common law*** or statutes of any State." 17 U.S.C. § 301(a) (emphasis added). As the Court has recognized, Congress' objective with this clause was to create "national, uniform copyright law by broadly pre-empting state statutory and common-law copyright regulation." Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 740 (1989). Congress accomplished this broad preemption by use of the phrase "all legal or equitable rights" and by further specifying the inclusion of "the common law or statutes of any State." 17 U.S.C. § 301(a).

Similarly, other cases in which courts have held that federal statutes preempt state common law typically involve broad, unrestricted language in the preemption clause. The Court's decision in Cipollone highlights the importance of the specific language used in the preemption clause, as the Court only found common law to be preempted when precise language ("statement") was replaced with broader, unrestricted language ("requirement or prohibition").

505 U.S. at 504. Specifically, after holding that the narrowly tailored "statement" language of the 1965 FCLAA did not preempt common law, the Court held that the preemption clause in the subsequent version of the statute, the Public Health Cigarette Smoking Act of 1969, did preempt common law claims as well as positive enactments. Id. That clause held that "*[n]o requirement or prohibition* based on smoking and health shall be imposed *under State law with* respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act," 15 U.S.C. § 1334(b) (emphasis added).[3] The Court's holding in Cipollone further confirms that the FAAAA's preemption clause does *not* include common law claims. First, the Court held in Cipollone that "[t]he phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common law rules." 505 U.S. at 521. In contrast, the FAAAA's preemption clause does not speak broadly of "requirements" or "prohibitions" (in any form) but focuses solely on three categories of enactments—"law[s]," "regulation[s]," and "other provision[s]" that

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[3] Moreover, the Court made clear in Cipollone that the language of the preemption clause, not the legislative history, controls in determining the scope of preemption. Specifically, the Court noted that "portions of the legislative history of the 1969 Act suggest that Congress was primarily concerned with positive enactments by States and localities," but nevertheless held that common law claims were preempted because "the language of the Act plainly reaches beyond such enactments." Id. at 521.

are "enact[ed]" or "enforce[d]" by the states. 49 U.S.C. § 14501(c)(1).

As in Cipollone, the Court held in Riegel v. Medtronic, Inc. that the broad language "requirement[s]" included common law claims. 552 U.S. 312, 332 (2008) (analyzing 21 U.S.C. § 360k(a)). Notably, in reaching its conclusion in Riegel, the Court reasoned: "Congress is entitled to know what meaning this Court will assign to terms regularly used in its enactments." Id. at 324. Just as Congress is entitled to know that the Court will interpret the broad term "requirement" broadly, it is entitled to know that courts will give meaning to its more carefully drawn preemption clauses, including those such as the FAAAA, which refers only to specific categories of positive law enactments. It avoids broad terms such as those in ERISA ("[a]ny and all State laws," 29 U.S.C. § 1144(a)) that is defined to include decisional law, the Copyright Act ("right...under the common law," 17 U.S.C. § 301(a)), and the statutes discussed in Cipollone ("requirement or prohibition," 15 U.S.C. § 1334(b)) and Riegel ("requirement, 21 U.S.C. § 360k(a)).

III. THE ONLY WAY TO EFFECT THE PURPOSE BEHIND THE FAAAA'S PREEMPTION CLAUSE IS TO CONCLUDE THAT IT PREEMPTS ONLY POSITIVE LAW ENACTMENTS.

The only way to give effect to the purpose behind the FAAAA's preemption clause is to conclude that "other provision having the force and effect of law" refers only to positive enactments. Prior to 1978, both the airline and trucking

industries were subject to extensive economic regulation which insulated incumbent carriers from competition and produced higher prices and inefficiencies. See H.R.Rep. No. 95–1211, at 2-3 (1978) (noting the "highly anticompetitive" results from pre-1978 federal regulation of airline industry, including limited approvals of route applications and high fares); Central Forwarding, Inc. v. I.C.C., 698 F.2d 1266, 1278 (5th Cir. 1983) (existing regulatory structure in trucking industry "'has tended ... to inhibit market entry, carrier growth, maximum utilization of equipment and energy resources, and ... has resulted in some operating inefficiencies and some anticompetitive pricing'") (quoting Congressional findings in Motor Carrier Act of 1980).

Congress addressed these particular problems by deregulating both the airline and trucking industries. First, it enacted the ADA, replacing federal economic regulation of the airline industry with a policy of "'maximum reliance on competitive market forces.'" Morales, 504 U.S. at 378 (quoting the ADA). To prevent States from undoing federal deregulation with their own regulatory enactments, the ADA included a preemption provision, prohibiting states from enforcing any law "relating to rates, routes, or services" of any air carrier. Id. (quoting the ADA). As properly recognized by the Court, the ADA's preemption clause applied only to "state-imposed obligations." American Airlines, Inc. v. Wolens, 513 U.S. 219, 228 (1995).

Two years later, Congress deregulated the trucking industry through the Motor Carrier Act of 1980, but Congress did not initially include a preemption provision in the Act. Congress later

decided that preemption was necessary in order to eliminate the inefficiencies, costs, and inhibition of innovation caused by the "patchwork" of anticompetitive regulations in various jurisdictions. H.R. Conf. Rep. 103-677 at 87 (1994) (on the FAAAA). Accordingly, in 1994, Congress enacted the FAAAA's preemption provision, using wording almost identical to that in the ADA. Congress' purpose was "to prevent States from undermining federal deregulation of interstate trucking." American Trucking Ass'ns, Inc. v. City of Los Angeles, 660 F.3d 384, 395 (9th Cir. 2011), as amended (Oct. 31, 2011) (citing Rowe v. N.H. Motor Transp. Ass'n, 552 U.S. 364, 368 (2008)). The ultimate goal was to address "the sheer diversity of [state] ***regulatory schemes***." H.R. Conf. Rep. 103-677 at 877 (emphasis added).

The history and purpose of both the ADA and the FAAAA make it clear that Congress wrote preemption clauses to protect the industries from affirmative state enactments—not from common law claims. Both the ADA and FAAAA were enacted to remedy the variety of anticompetitive regulations across jurisdictions, whereas common law claims play no role in the "patchwork" of "regulations" Congress sought to avoid. H.R. Conf. Rep. 103-677 at 87 (1994). A common law claim would not have the feared effect of "undermining federal deregulation of interstate trucking." American Trucking Ass'ns, Inc., 660 F.3d at 395. Therefore, in light of the particular harms the FAAAA's preemption clause was designed to resolve, it would run contrary to Congressional purpose for the Court to ignore the statutory language that Congress chose

to enact and to hold that the FAAAA preempts common law claims as well as claims based on positive state law enactments.

CONCLUSION

For the reasons described above, the Court should hold that the plaintiff's common law claims are not preempted by the Federal Aviation Administration Authorization Act.

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AMICUS CURIAE BRIEF

No. 12-52

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In The Supreme Court of the United States

DAN'S CITY USED CARS, INC., D/B/A DAN'S CITY AUTO BODY,

Petitioner,

v.

ROBERT PELKEY,

Respondent.

On Writ of Certiorari to the Supreme Court of New Hampshire

BRIEF OF THE PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT, ROBERT PELKEY

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INTEREST OF THE AMICUS CURIAE

The Property Casualty Insurers Association of America ("PCI") is a non-profit, national trade association that speaks for a large portion of the insurance industry in America.[1] PCI has more than 1,000 members. They do business in all fifty states, the District of Columbia, and Puerto Rico. PCI's insurers account for approximately 40% of the nation's property casualty insurance. Particular to the issue before the Court, PCI's member companies write about 46% of the automobile insurance issued across the nation.

PCI is uniquely qualified to represent the views of the property casualty insurance community respecting the issue before the Court. PCI members insure millions of motor vehicles and their owners, and PCI's member companies have paid hundreds of millions of dollars in towing company charges and costs under policies issued to their insureds. PCI and its members thus are acutely affected by issues relating to the relationship between towing companies, such as the petitioner, and insured vehicle owners, such as the respondent.

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[1] Pursuant to Rule 37.6 of this Court, no counsel for any party authored this brief either in whole or in part, and neither counsel for a party nor any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than PCI and its members made a monetary contribution supporting preparation of this brief. Both the Petitioner and Respondent have consented to the filing of this brief.

PCI is concerned that, were the decision of the Supreme Court of New Hampshire reversed, insureds would be unable to seek redress in court for towing company misconduct like that at issue in this case. PCI submits, consistent with the New Hampshire court's ruling, that its members' insureds should have a remedy when towing companies violate the law. That law should be given effect, and it should not be subject to preemption—especially where, as here, federal law does not provide for an alternative remedy. States should be permitted to regulate towing companies by enacting commonsense laws to prevent abuses, and, when needed, to provide for their redress.

SUMMARY OF THE ARGUMENT

This court should affirm the decision of the Supreme Court of New Hampshire. Mr. Pelkey advances both state statutory and common law negligence claims. These claims are not preempted by 49 U.S.C. §14501(c)(1).

Preemption under §14501(c)(1) applies in this case only where three elements are present:

(1) a state has enacted a "law, regulation, or other provision";

(2) that provision "relate[s] to" a motor carrier's "price, route, or service"; and

(3) the "price, route, or service" is "with respect to the transportation of property."

49 U.S.C. §14501(c)(1). These elements are entirely absent here, most notably because the disposal of a towed vehicle does not "relate to" a towing company's "price, route, or service," nor is the disposal of vehicles an activity "with respect to the transportation of property."

This reading is supported by the fact that state regulation of towing company vehicle disposal does not interfere with Congress' intent in enacting Section 14501(c)(1). That intent was to prevent a nationwide patchwork of *transit regulations*—regulations affecting prices, routes, and services. Congress did not intend to interfere with state law relating to the disposition of property in the possession of a carrier.

Dan's City's argument, if accepted by the Court, would be contrary to Congressional intent. It would shift the financial burden of towing misconduct onto the shoulders of people like Mr. Pelkey, and potentially onto insurance companies like PCI's members. This is especially inappropriate given the harm towing companies like Dan's City cause. PCI submits that Mr. Pelkey should be permitted to avail himself of state law remedies, as the New Hampshire court held.

ARGUMENT

I. The text of 49 U.S.C. §14501(c)(1) does not preempt Mr. Pelkey's claims.

The Supreme Court of New Hampshire correctly held that Mr. Pelkey's claims are not preempted by this provision:

> [A] State ... may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier ... with respect to the transportation of property.

49 U.S.C. §14501(c)(1). Thus, in order to trigger the preemptive effect of this provision under the circumstances here, three elements must be present:

(1) a state has enacted a "law, regulation, or other provision";

(2) that provision "relate[s] to" a motor carrier's "price, route, or service"; and

(3) the "price, route, or service" is "with respect to the transportation of property."

While it is true that the Court has not precisely defined the "borderline" between matters preempted under Section 14501(c)(1) versus those that are not, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 390 (1992) (citation omitted), the Court

has constructed a number of signposts to guide the preemption analysis.

With respect to Section 14501(c)(1)'s "related to" language, preemption of course applies where states attempt to "directly regulate[]" carrier prices, routes, or services respecting the transportation of property. *Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 373 (2008). Preemption also applies to matters "having a connection with or reference to" such matters, *id.* at 384, and a "'significant' and adverse 'impact'" with respect to the statutory scheme's ability to achieve its objectives. *Rowe*, 552 U.S. at 371 (2008) (quoting *Morales*, 504 U.S. at 390).

Section 14501(c)(1) therefore will prevent a state's "direct substitution of its own governmental commands for 'competitive market forces'" in determining the services that motor carriers will provide. *Rowe*, 552 U.S. at 384 (quoting *Morales*, 504 U.S. at 378). The provision does so by preventing "a patchwork of state service-determining laws, rules, and regulations" that are "inconsistent with Congress' major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace." *Rowe*, 552 U.S. at 373.

But there is no preemption where the state matter affects pricing "in too tenuous, remote, or peripheral a manner." *Morales*, 504 U.S. at 390. That is the case here.

In addition to the "related to" language, Section 14501(c)(1) further self-limits its preemptive

effect because the "price, route, or service" in question must be "with respect to the transportation of property." As Justice Scalia has previously expressed, this "with respect to" language "massively limits the scope of preemption to include only laws, regulations, and other provisions that single out for special treatment 'motor carriers of property.'" *Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 449 (2002) (Scalia, J., dissenting). Because of this limitation, states "remain free to enact and enforce general traffic safety laws, general restrictions on the weight of cars and trucks that may enter highways or pass over bridges, and other regulations that do not target motor carriers 'with respect to the transportation of property.'" *Id.*

This case is not a close one. It clearly falls on the non-preemption side of the "borderline." *Morales*, 504 U.S. at 390. Mr. Pelkey's claims do not "relate to" carrier prices, routes or services respecting the transportation of property. They do not amount to a state law attempt to "directly regulate[]" prices, routes, or services, nor do they have a "'significant' and adverse 'impact'" with respect to the statutory scheme's ability to achieve its objectives. *Rowe*, 552 U.S. at 371, 373. Indeed, permitting Mr. Pelkey and others like him to bring state law claims relating to the wrongful disposition of their cars by towing companies will not result in interference with "competitive market forces" by imposing a "patchwork" of state laws impeding carrier prices, routes, or services. *Id.* at 384, 373. Mr. Pelkey's claims simply are "too tenuous, remote, or peripheral" to be preempted under Section 14501(c)(1). *Morales*, 504 U.S. at 390.

Perhaps more significantly, Mr. Pelkey's claims do not relate to a carrier "price, route, or service" "*with respect to the transportation of property*." That "massively limit[ing]" language, *Ours Garage*, 536 U.S. at 449 (Scalia, J., dissenting), expresses a *movement* requirement. Thus, in order to trigger Section 14501(c)(1) preemption, a carrier's activities in question *must* involve the movement of property. Here, however, Mr. Pelkey's claims have nothing to do with Dan's City's *movement* of his car. They have to do with its *disposition* of that property. Moreover, the state laws under which Mr. Pelkey brings his claims are not targeted to towing companies.

Thus, the "with respect to" limiting language of Section 14501(c)(1) compels the conclusion that Mr. Pelkey's claims are not preempted. Indeed, if under that language states "remain free to enact and enforce general traffic safety laws," such as restrictions on the weight of cars and trucks that may enter highways, *id.*, then states similarly must be free to permit people like Mr. Pelkey to proceed with their state law statutory and common law claims when a towing company like Dan's City wrongfully disposes of their cars.

Because the Supreme Court of New Hampshire correctly reached this conclusion, this Court should affirm the decision below.

II. Third parties, such as insurance companies, rely on the body of state laws covering towing and disposal of towed vehicles.

State law applicable to the disposal of towed vehicles is important, as Mr. Pelkey acknowledges, because those laws are needed to transfer title when vehicles are disposed of, among other reasons. Resp't Br. 31. The need to rely on those laws, however, is not limited solely to the internal needs of the states. Numerous third parties rely on state statutory schemes applicable to towed vehicles and their disposal. PCI's insurance company members, for example, also rely on those laws, as they play an integral role in the towing process.

Insurance policies issued by automobile insurers typically include coverage provisions for payment of towing-related expenses in the event of an auto breakdown or accident. *See, e.g., Miller v. City of Chicago*, 774 F.2d 188, 193 (7th Cir. 1985) ("towing and storage charges are ordinarily covered by standard auto insurance policies"); *see also Amicus Curiae* Br. of Cal. Tow Truck Ass'n 13 (acknowledging insurance companies' role in the towing process). Insurance companies insure millions of motor vehicles and their owners, and every year pay millions of dollars in towing company charges and costs under their policies. Insurers rely on state statutory schemes applicable to towing as one of the foundational building blocks upon which their towing coverage provisions rest.

Were this Court to accept the overbroad preemption argument advanced by Dan's City, one of

the fundamental underpinnings of law relied upon by insurers in furnishing towing coverage would be significantly weakened. Such a ruling could increase the cost of insurance. Insureds might make additional policy claims if unable to seek a remedy from the wrongdoer towing company under state law, for example. Those costs inevitably will have to be passed on, in some form, to insurance consumers. This result runs counter to Congress' intent to create market efficiency when it passed the statutory scheme before the Court. *Cf. Rowe*, 552 U.S. at 371 (describing goal of Congress to stimulate "efficiency, innovation, and low prices" (quoting *Morales*, 504 U.S. at 378)).

In addition, given that towing coverage under an insurance policy is, of course, not without its limits, preemption of Mr. Pelkey's claims could also expand insureds' *own* obligations where a towing company has done wrong. Indeed, there are many instances where towing-related insurance coverage is inapplicable; so, if preempted, Mr. Pelkey's claims, and those of many others, will neither be covered by insurance nor actionable under state law.

If this Court sides with the preemption argument advanced by Dan's City, the financial burdens to be borne by insureds like Mr. Pelkey and insurance companies like PCI's members will increase. That burden is misplaced. It should be borne by the alleged wrongdoer – the towing company – and should not be inequitably shifted either to the vehicle's owner or to the insurance company.

III. Vehicle owners should be allowed to avail themselves of state law remedies against towing companies where no such remedies are provided under federal law.

Given Dan's City's preemption arguments, one would logically expect an available federal remedy to apply to Mr. Pelkey's claim against Dan's City. But no federal remedy exists, a matter about which there is no dispute. This is because Congress, in enacting the statutory scheme, was seeking to prevent a "patchwork" of state laws concerning the prices, routes, and services of motor carriers. *See Rowe*, 552 U.S. at 373; Resp't Br. 26-28. Congress simply was not attempting to address claims by vehicle owners against towing companies that dispose of vehicles.

That Congress did not create a federal remedy for claims against towing companies dovetails with the notion that regulation of towing companies has traditionally been the province of state law. *See, e.g.*, Resp't Br. note 1 (referencing various state laws applicable to disposal of towed vehicles). That traditional role in this arena should be sustained by this Court. Mr. Pelkey should have a remedy under state law given federal law does not supply one. The Supreme Court of New Hampshire so held, consistent with this Court's decisions. *See Silkwood v. Kerr–McGee Corp.*, 464 U.S. 238, 251 (1984) ("[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct"). That decision should be affirmed.

CONCLUSION

For the foregoing reasons, *amicus curiae*, the Property Casualty Insurers Association of America, respectfully requests that this Court affirm the decision of the Supreme Court of New Hampshire.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 12-52

In The Supreme Court of the United States

DAN'S CITY USED CARS, INC. D/B/A DAN'S CITY AUTO BODY,

Petitioner,

v.

ROBERT PELKEY,

Respondent.

On Writ of Certiorari to the
Supreme Court of New Hampshire

BRIEF FOR TOWING AND RECOVERY ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE* [1]

Towing and Recovery Association of America ("TRAA") is the national association of motor carriers engaged in the towing and recovery of motor vehicles. Through its direct membership and the federation of fifty state towing associations and the towing association of the District of Columbia, TRAA represents the interests of more than 25,000 motor carriers engaged in towing operations involving every type and size of motor vehicle that is operated on our nation's highways. This case is of particular interest to TRAA because a reliable mechanism for disposing of unclaimed towed vehicles – and collecting outstanding fees from the proceeds of such disposition – is an important aspect of most towing businesses.

STATEMENT

As the parties both note, this case comes before the Court on a set of facts that have not been fully and finally determined by a judge or jury, but that are viewed in a light most favorable to the Respondent as the non-moving party defending against a summary judgment motion below.

Amicus will likewise assume the facts as presented, but hastens to add that it takes no position on

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[1] No counsel for a party authored this brief in whole or in part and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. Nor did any person or entity, other than *Amicus*, its members, or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief. This brief is filed with the written consent of all parties.

whether those facts are true or how a jury might or should ultimately view the competing claims of the parties. In short, *Amicus* takes no position on whether Petitioner actually committed the wrongs with which it is charged. As an association of towing and recovery operators, *Amicus* certainly hopes the tow operator in this case in fact acted honorably and lawfully, but it believes that question is for a court or jury to decide.

Amicus's primary interest in this case is to ensure the preservation of background rules for the disposition of unclaimed vehicles and the collection of towing and storage fees due on such vehicles. Such background rules protect both the tow companies and consumers and contribute to the efficient functioning of the market. Petitioner in this case, like many TRAA members, is engaged in the business of towing away and storing vehicles. Such towing and storage can be either consensual or nonconsensual. In many cases, the towing and storage involves vehicles that have improperly parked on private property. Real property owners or managers, *e.g.*, owners and managers of apartment complexes or shopping centers, hire and authorize towing companies to remove vehicles that are improperly parked on the property, *e.g.*, parked in fire lanes or designated "no parking" areas, parked in handicapped parking stalls without displaying a valid handicapped placard, blocking garages and/or dumpsters, and blocking snow-removal efforts.

Towing and storage of vehicles also occur as the result of requests from law enforcement agencies. Every year in the United States, hundreds of thousands of abandoned vehicles, wrecked vehicles, vehi-

cles driven by persons who have been arrested, or vehicles seized pursuant to a forfeiture proceeding, are towed and stored at private tow lots at the direction of law enforcement agencies.

And, in some cases, vehicles are towed and stored at the direct request of the vehicle owner, for example, when a vehicle suffers mechanical difficulty away from the owner's home and a garage or other location is not immediately available.

In most states, towing firms that lawfully tow and store motor vehicles enjoy a possessory lien to secure payment of their towing and storage fees.

The vast majority of towed and stored vehicles are retrieved by their owners, prior lienholders, or insurers within a reasonable time after the they are towed. However, thousands of towed and stored vehicles — typically valueless salvage or extremely low-valued vehicles — go unclaimed and are abandoned in private towing lots by their owners or insurers. In those instances, towing companies must foreclose their liens in accordance with the respective state laws relating to unclaimed vehicles. The ability to dispose of unclaimed vehicles efficiently is essential to the financial well-being of towing companies.

The New Hampshire law under which the Petitioner towing company processed Respondent's vehicle is fairly representative of state laws governing the foreclosure of towing liens and the disposal of unclaimed vehicles.

It grants the towing company certain rights and imposes certain responsibilities in connection with the exercise of those rights. Upon satisfaction of those various responsibilities, the vehicle is typically

sold at auction. In most instances, the auction price only partially satisfies the outstanding towing and storage lien. The vast majority of vehicles sold at towing company auctions sell for less than $500. Most are sold for parts, or crushed and recycled.

As noted above, the expedited, cost-efficient method of disposing of unclaimed vehicles provided by most state statutes is crucial to the towing business. Without a non-judicial means of processing unclaimed vehicles, towing yards throughout the nation would overflow with junk and derelict vehicles while towing agencies devote unnecessary time and effort pursuing court orders for vehicle lien foreclosures. The loss of the non-judicial lien foreclosure mechanisms to federal preemption would be crippling to the automotive towing industry.

While *Amicus* TRAA takes no position on the alleged misconduct of Petitioner in the case at bar, it recognizes that errors can, and do, occur in the processing of unclaimed towed vehicles. For example, a required written notice might be delinquent, incomplete, or inadvertently sent to an incorrect address. Such errors result in the failure, or at least delay, of notification to the owner or prior lienholder. If notice is delayed, the owner or prior lienholder incurs additional, unwanted, vehicle storage fees. If a written notice never reaches the owner or lienholder, a vehicle might be sold at auction without the prior knowledge of any interested party.

Regrettably, there are also documented instances in which a towing company fraudulently manipulated the lien foreclosure procedure for financial gain. Although, as noted above, the vast majority of unclaimed

vehicles sold at auctions are of junk value only, occasionally a vehicle with substantial value will be towed to a private tow yard. In those cases, if the vehicle is not redeemed and no outside bidders appear for the auction, a tow truck company could potentially obtain the "windfall" of a high-value vehicle upon a bid of his outstanding towing and storage fees. An unscrupulous tow operator might intentionally misdirect mailed notices or publish incorrect newspaper ads in an effort to circumvent proper notice and avoid outside bidders.

Noting once again that it takes no position on the allegations raised in the complaint filed in this case, *Amicus* believes that it is untenable for a vehicle owner to be without legal recourse for the negligent or intentional failures of a towing company in the unclaimed vehicle lien foreclosure process. Both the tow company and the vehicle owner thus stand to benefit from state background laws governing the disposition of unclaimed vehicles.

SUMMARY OF ARGUMENT

1. It has been difficult for courts consistently to determine which state laws are *sufficiently* related to the prices, routes, and services of motor carriers with respect to the transportation of property to be preempted by 49 U.S.C. § 14501(c)(1). The statutory phrase "related to" is largely indeterminate, potentially endless, and the source of much of the problem. While this Court's cases have attempted to define the scope and limits of that phrase, those efforts have not brought meaningful clarity, and many cases continued to be decided on an *ad hoc* balancing of a variety

of factors often with seemingly conflicting results. The jurisprudence as it stands thus lacks predictability and definition, and contains a large "grey" area – into which the present case falls – in which the outcome of the preemption analysis is regularly uncertain.

Amicus proposes a partial solution to this problem within that grey area that will add certainty, preserve important background laws that facilitate the efficient functioning of the towing market, and yet still allow towing companies to innovate and compete within the market as Congress intended: for laws falling in the grey area of relatedness – those neither closely connected to price, routes, or service nor having a plainly tenuous relationship to such matters – there should be no preemption *unless* the conduct or activities subject to such laws are included in an agreed-upon contract for towing service between the tow truck operator and the vehicle owner or his agent. Once included in a market-based agreement, the relationship of such subject matter to towing price, route, and service would be closer than if left unaddressed, and state law purporting to regulate such matters would then be preempted. In effect, state laws touching upon such grey areas would provide a default rule that could be modified by the very type of market-based transactions that Congress sought to encourage and insulate.

This proposed rule, though not covering every situation, is far more judicially administrable, provides greater predictability to States and tow truck businesses alike, and preserves as a default many back-

ground laws, such as the one in this case, that are important to the efficient functioning of the market.

2. As applied to this case, the proposed rule would result in affirming the decision below. The disposition of towed vehicles as a means of recovering a tow truck business's unpaid fees for towing and storage services and terminating the provision of such services certainly has *some* relationship to fees and services, but that relationship is attenuated and is likewise comparable to, and a subset of, the more generally applicable areas of debt collection, bailment, and property disposition. Whether the relationship of this post-towing activity is *sufficiently* closely related or instead too tenuously related to prices and service to fall within the statutory notion of "related to" is highly debatable and ultimately a multifaceted policy judgment regarding the towing industry. The laws in this case regulating such matters thus fall well inside the grey area of the preemption provision. That being the case, they would not be preempted absent some alternative agreed to in the towing contract, for which there appears to be no evidence in this case.

Additionally, even if a provision addressing the collection of outstanding fees through sale of the vehicle were included in the contract (or this Court otherwise deemed the laws at issue here to be closely "related" and hence not in the grey area), such matters would be more naturally understood as related to price rather than service (or, at worst, to both price and service). Thus, to the extent the tow in this case was nonconsensual, the relevant law would be excluded from otherwise applicable preemption by 49 U.S.C. § 14501(c)(2)(C), excluding from preemption state law

related to price in the case of nonconsensual tows. Though the tow in this case would seem to have been nonconsensual, there is at least the potential for disagreement on that question and the New Hampshire Supreme Court had no need to consider the those matters. *Amicus* thus takes no position on whether the tow in this case was nonconsensual for purposes of the exemption, merely that if it was, the exemption would apply if the preemption provision applied.

Amicus encourages this Court to avoid some of the more extreme positions offered by both sides. Petitioner's suggestion that essentially anything to do with a towing company's business is related to its services sweeps too far and would likely preempt many laws on which towing companies rely to conduct that very business. It likewise leaves insufficient redress for consumers who, unfortunately, may encounter troubling and injurious conduct by tow truck operators.

Respondent's suggestion that *all* common law is excluded from the preemption provision likewise sweeps too far. This Court has recognized in other contexts that judicially created tort duties have the force and effect of law no less than statutory or regulatory law, and can often have comparable regulatory effects.

Similarly, Respondent's suggestion that the phrase "with respect to the transportation of property" excludes virtually *any* activities once the "movement" of the vehicle is complete also overstates the matter. Transportation as defined in the statute includes storage, handling, and interchange of the property, and hence the disposition of an unclaimed towed ve-

hicle being stored by the tow truck business is at least closely "related to," or actually included in, the transportation of that same vehicle.

Finally, while *Amicus* shares many of the concerns of topside *amicus* California Tow Truck Association ("CTTA"), it disagrees with CTTA's broad and amorphous focus on attenuated effects, highly variable and changing local circumstances and laws, and unmeasurable considerations regarding liability avoidance and similar matters. The different types of laws identified by CTTA present different issues and concerns than the law in this case, and any uncertainty regarding their preemption likely requires different solutions. This is not the case to speculate on such matters.

ARGUMENT

I. State Law Providing Background Rules For Commercial Interaction and Not Closely Related to Prices, Routes, or Services Should Not Be Preempted Absent Contractual Terms Providing for Different Rules and Thereby Creating the Requisite Close Relation.

The federal preemption provision at issue in this case, 49 U.S.C. § 14501(c)(1), prohibits States or their political subdivisions from enacting or enforcing any "law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier * * * with respect to the transportation of property."

The statutory phrase "*related to* a price, route, or service," however, is notoriously indeterminate and

undefined, and has led to much of the difficulty in applying the provision. *See, e.g.*, Pet. 12 (summarizing conflicting outcomes and reasoning in cases regarding extremely similar facts); *Travel All Over the World, Inc.* v. *Kingdom of Saudi Arabia*, 73 F.3d 1423, 1433 (CA7 1996) ("courts have reached divergent results regarding whether claims for slander and defamation are preempted by the ADA" * * *. [citations omitted] *Morales* does not permit us to develop broad rules concerning whether certain types of common-law claims are preempted by the ADA. Instead, we must examine the underlying facts of each case to determine whether the particular claims at issue 'relate to' airline rates, routes or services.").

Because of such indeterminacy and the potentially limitless sweep of the concept "related to," this Court has recognized that the proper question is not whether state law is related to price, route, or service in any conceivable sense, but whether the relationship to such matters is sufficiently close, or too tenuous, to come within the preemptive reach of the statute. *See Rowe* v. *New Hampshire Motor Transport Association*, 552 U.S. 364, 375 (2008) ("[F]ederal law does not pre-empt state laws that affect rates, routes, or services in 'too tenuous, remote, or peripheral a manner.' ") (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 390 (1992)).; *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (analogous "relate to" language in the ERISA preemption clause cannot extend "to the furthest stretch of its indeterminacy" because "then for all practical purposes preemption would never run its course").

This formulation of the preemption question thus creates a significant grey area in which laws having some relationship to towing and other transportation activities must be measured against a variety of factors whose application and weight is anything but clear and predictable.

This case falls squarely within that grey area of the law, with the parties debating whether the sale or disposal of a towed vehicle in order collect an unpaid fee for towing and storage is "related to" the price or services of a tow truck operator and comes within the broad, but not unlimited, scope of preemption under § 14501(c)(1). Both sides, however, take an overly simplified view of the case – each advancing categorical arguments as to why the disposition of unclaimed towed vehicles is either necessarily related to towing services or plainly not included in such services but rather a discrete activity entirely separate from such services. *Compare, e.g.*, Pet. Br. 21 ("It defies logic to suggest that the actions of the tow trucker in connection with disposition of the vehicle are not associated or connected with the towing and storage services in the first instance."), *with* Resp. Br. 25-26 ("Pelkey is not challenging how Dan's City arranged for the tow of his vehicle, or how it delivered, handled, or interchanged his vehicle. He is challenging actions related to how it *disposed* of his vehicle, that is, how it purported to extinguish his property rights and transferred his property to someone else."). Both parties are partially wrong – and partially right.

The disposition of an unclaimed towed vehicle as a means of collecting fees owed for towing and storage, and in order to terminate the towing company's con-

tinued, uncompensated, storage of the vehicle, certainly has *some* relationship to the preceding act of towing the vehicle, the appurtenant storage of the vehicle pending delivery to its owner, and the price charged yet unpaid for those activities. The issue however, is not the existence of a relationship *vel non*, but whether that relationship is sufficiently close to trigger statutory preemption. That question is nowhere near as clear-cut as either Petitioner or Respondent would have it. Simply asserting categorical labels for the relevant activities – "service" versus "sale of property" or "debt collection" – adds little to the otherwise policy-based balancing arguments the parties also offer. The reality is that the disposition of an unclaimed towed vehicle has aspects of each of the claimed categorizations and this Court must determine whether the law governing such dispositions treads strongly enough on protected activities as to warrant preemption.

This Court's current jurisprudence does not provide a satisfying or predictable answer to this and other questions dealing with the grey area of preemption. The cases too often turn on debatable and case-specific judgments regarding the impact of different laws, or the tenuousness or closeness of a relationship – determinations that are, quite frankly, not well-suited for judicial determination, not conducive to predictable and consistent outcomes, and seem overly legislative rather than legal in character.

The ambiguity and uncertainty of current jurisprudence serves nobody – it creates legal and commercial uncertainty for both States and tow-truck operators, it allows considerable interference with tow

truck operations and market forces, and it creates a variety of conflicting decisions in the courts, which ultimately will have to be resolved on an *ad hoc* basis. What would be better is a simpler and clearer rule for addressing cases falling within the grey area of preemption under § 14501(c)(1) that allows States to provide background default rules that enhance efficiency in commercial transactions, yet still allows for the operation of market forces when such background rules genuinely impinge upon tow-truck prices, routes, and services.

Amicus respectfully suggests that an appropriate rule within the grey area is a default presumption that generally applicable state background rules governing commercial transactions be deemed insufficiently related to prices, routes, and service to trigger preemption *unless* those background rules are altered by a contract defining the terms and related conditions of the prices, routes, and services provided by the operator transporting a vehicle. Put differently, state law will *not* be preempted unless the subject matter to which that law applies has been addressed in the contract between the tow truck operator and its customer and thereby been made "related to" the price, route, or service of the operator through the very market mechanisms envisioned by Congress.

This approach respects both the general right of the States to set rules for commercial transactions, the presumption against preemption of state law, the interests of both tow-truck operators and consumers in having reliable and predictable rules to fall back in situations for which they have not otherwise provided, and Congress's purpose in allowing the market to

dictate prices and services related to the transport of property by motor carrier. *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 230 (1995) (the parallel ADA "was designed to promote 'maximum reliance on competitive market forces.' [Citation omitted.]"); *Morales*, 504 U.S. at 378 ("Congress, determining that 'maximum reliance on competitive market forces' would best further 'efficiency, innovation, and low prices" as well as "variety [and] quality * * * of air transportation services,' enacted the Airline Deregulation Act (ADA)."") (citations omitted).

This proposed rule, though not covering every situation, is far more judicially administrable than an ill-defined inquiry into the magnitude of the relationship to prices, routes, and services in grey-are cases, provides greater predictability to States and tow truck businesses alike, and preserves as a default many background laws, such as the one in this case, that are important to the efficient functioning of the market. Indeed, the proposed rule would wholly alleviate the significant concern of *Amicus* that preemption would create a legal gap that would interfere with tow truck operators' ability to dispose of unclaimed cars, and collect their owed fees, in an orderly manner. *See* Resp. Br. at 32 ("If the FAAAA preempts state-law claims relating to the disposal of towed vehicles, however, it must also preempt positive state regulation of such disposal."); *id.* at 33 ("Such regulation is not necessary only to protect ve-

hicle owners, but also to protect towing companies in possession of abandoned cars.").[2]

II. Application of the Proposed Preemption Rule to this Case Results in Affirming the Decision Below.

Applied to this case, the proposed rule would result in affirming the decision below. As discussed in the previous section, the disposition of towed vehicles as a means of recovering a tow truck business's unpaid fees for towing and storage services and terminating the provision of such services certainly has *some* relationship to fees and services, but that relationship is somewhat attenuated. The law governing the disposition of unclaimed vehicles is of general application, includes bailment rules and statutory prohibitions against deception in commercial transactions, and thus consists of background rules without which the market would not function efficiently. The laws in this case regulating such matters thus fall well inside the grey area of the preemption provision. That be-

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[2] The rule also avoids unnecessary transaction costs where state laws strike a suitable balance on issues that can then be left unaddressed, and preserves the requisite freedom to change such background rules where market conditions and competition make such changes worthwhile and acceptable to the parties buying and selling towing services. A rule that presumed preemption and then placed the burden on market participants to affirmatively opt in by contract to state background rules would have far higher transaction costs and would leave open the likelihood of disruptive gaps and unprovided-for cases where if state law was preempted there would be no law to apply.

ing the case, they would not be preempted absent some alternative agreed to in the towing contract.

There is no indication in this case that the disposal of towed vehicles was made part of any towing contract. There certainly was no contract between Petitioner and Respondent, and consequently no agreed alternative to the state-law procedures for disposing of a vehicle in order to collect the fee for towing and storing the towed vehicle. The record likewise does not reflect any contract between Petitioner and the property owner that requested the tow, certainly no contract that provided for disposal rules different from the background state law, and no indication that the property owner was authorized to act as Respondent's agent regarding the terms and conditions of towing.

Apart from being spared preemption by *Amicus*'s proposed rule, the law at issue here might still preserved under the limited exception for nonconsensual tows. That clause, 49 U.S.C. § 14501(c)(2)(C), provides that preemption "does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle."

To the extent that he tow in this case was nonconsensual, it would seem that the disposal of a vehicle in order to collect the price of towing and storage relates at least as much to *price* as to service. Although the proposed rule would lead to the conclusion that the challenged law is not sufficiently "related to"

either price or service, if this Court disagrees, or if there turns out to be an applicable contract addressing such matters, the laws might likewise fall within the exception for laws relating to the price of a nonconsensual tow as well. *Amicus* takes no position on whether the tow in this case was nonconsensual. While that would seem to be the case, the issue was not addressed by the court below and there are at least conceivable arguments to the contrary. If necessary the issue can be reconsidered when this case goes back on remand.

As a final matter, *Amicus* urges this Court not to resolve this case based on some of the more extreme legal claims offered by the parties.

For example, Petitioner's suggestion, at 34-35, that essentially anything "incidental" to a towing company's activities is sufficiently "related to" its services sweeps too far and would likely preempt many laws on which towing companies rely to conduct that very business. It likewise leaves insufficient redress for consumers who, unfortunately, may encounter troubling and injurious conduct by tow truck operators.

Amicus likewise disagrees with Respondent's suggestion, at 12, 28-31, that common-law claims are *per se* exempt from preemption because they are not a law or regulation. State courts "make" law and a judicially created rule is no less law than a legislatively or administratively created rule, and certainly has the force and effect of law. Indeed, free-wheeling application of so-called common-law duties could readily morph into a full-blown regulatory scheme anchored by nothing more substantial than an amorphous requirement of fairness in commercial dealings or some

steroidal interpretation of a duty of good-faith and fair dealing. *See Riegel* v. *Medtronic, Inc.*, 552 U.S. 312, 324 (2008) (a tort judgment "establishes that the defendant has violated a state-law obligation. * * * And while the common-law remedy is limited to damages, a liability award " 'can be, indeed is designed to be, a potent method of governing conduct and controlling policy.' ") (quoting *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) (plurality), in turn quoting *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959)); *Cipollone*, 505 U.S. at 522 ("we have recognized the phrase 'state law' to include common law as well as statutes and regulations"); *Deerskin Trading Post, Inc.* v. *United Parcel Serv. of Am., Inc.*, 972 F. Supp. 665, 668 (N.D. Ga. 1997) (Congress intended motor carrier provision to have the same preemptive scope as the airline provision, and "Circuit courts applying the Supreme Court's decisions in *Morales* and *Wolens* have given the ADA's preemption provision a broad scope and, for the most part, have preempted state law tort actions where the subject matter of the action related to the price, route, or service of an airline."); *cf* 29 U.S.C. §§ 1144(a) and (c)(1) (ERISA preemption provision applicable to "any and all State laws" covers "all laws, decisions, rules, regulations, or other State action having the effect of law").

This Court's decision in *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 63 (2002), does not require a contrary result. As an initial matter, the language at issue here is broader than the language in *Sprietsma*, and includes in the scope of preemption the phase "other provision having the force and effect of law."

49 U.S.C. § 14501(c)(1). That language can and should be read to cover more than just positive enactments by the legislative or executive branches, but also requirements created and imposed by the judiciary – *i.e.*, the common law. Furthermore, including the common law as part of this latter phrase avoids the fault thought to exist in *Sprietsma* of rendering the word " 'regulation' * * * superfluous." 537 U.S. at 63. Rather, it rounds out the categories to now encompass legal requirements imposed by bodies other than the legislature (laws) or the executive (regulations).[3]

A judge-made rule – in the name of fairness or equity – that regulated or constrained the prices that could be charged, for example, should be no less subject to preemption that a statute requiring such fairness or equity (as then determined by judges or juries).

Similarly, Respondent's suggestion, at 23-26, that the phrase "with respect to the transportation of property" excludes virtually *any* activities occurring after the "movement" of the vehicle is complete also overstates the matter. Even the definition of transportation cited by Respondent, at 25, includes storage, handling, and interchange of the property that has been moved. The storage, handling, and transfer

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[3] And given that the preemption clause applies by its terms to the laws and regulations of political subdivisions as well, it is difficult to imagine what else the final phrase could encompass if not the common law. It thus would be Respondent's interpretation that renders the final phrase "superfluous," in contrast to the problem in *Sprietsma*.

of a towed vehicle – until it is delivered to its final recipient, whether the vehicle owner recovering the vehicle or a buyer if the vehicle is unclaimed – is at least closely "related to," if not squarely encompassed within the "transportation" of that same property. Recall that state law need not regulate the actual prices or services "with respect to the transportation of property," in order to be preempted, it merely needs to regulate matters sufficiently related to prices, routes, and services for the transportation of property. While certainly the relationship here is more attenuated that a direct effort to regulate the price of a tow or the specific service provided to the customer, the relationship to those activities still falls within the grey area of "related to."

Lastly, while topside *amicus* CTTA raises many legitimate problems facing the towing industry and the regulatory challenges it must confront in areas with multiple jurisdictions, it does not identify a workable solution to those problems. Merely "considering" a laundry-list of factors, many of which will change on a case-to-case basis, does not provide certainty, does not provide a judicially manageable rule, and will not reduce continued litigation over the scope of preemption or conflicts among the decisions arising from such litigation. CTTA Amicus Br. 29 ("Those factors include the magnitude of the impact, the extent to which other cumulative or conflicting laws govern the same motor carrier conduct, and the extent to which it is commercially reasonable to manage the risk that would flow from imposing liability."). A clearer and more workable rule is required. While *Amicus* is thus sympathetic to many of the is-

sues raised by the CTTA, we must differ with its legal approach.

In any event, the different types of laws identified by CTTA present different issues and concerns than the law in this case, and any uncertainty regarding their preemption likely requires different solutions. This is not the case to speculate on such matters.

CONCLUSION

For the reasons above, this Court should affirm the decision below.

Respectfully submitted,

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